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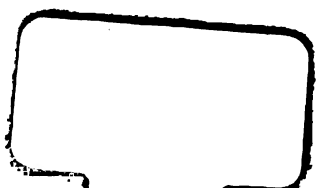
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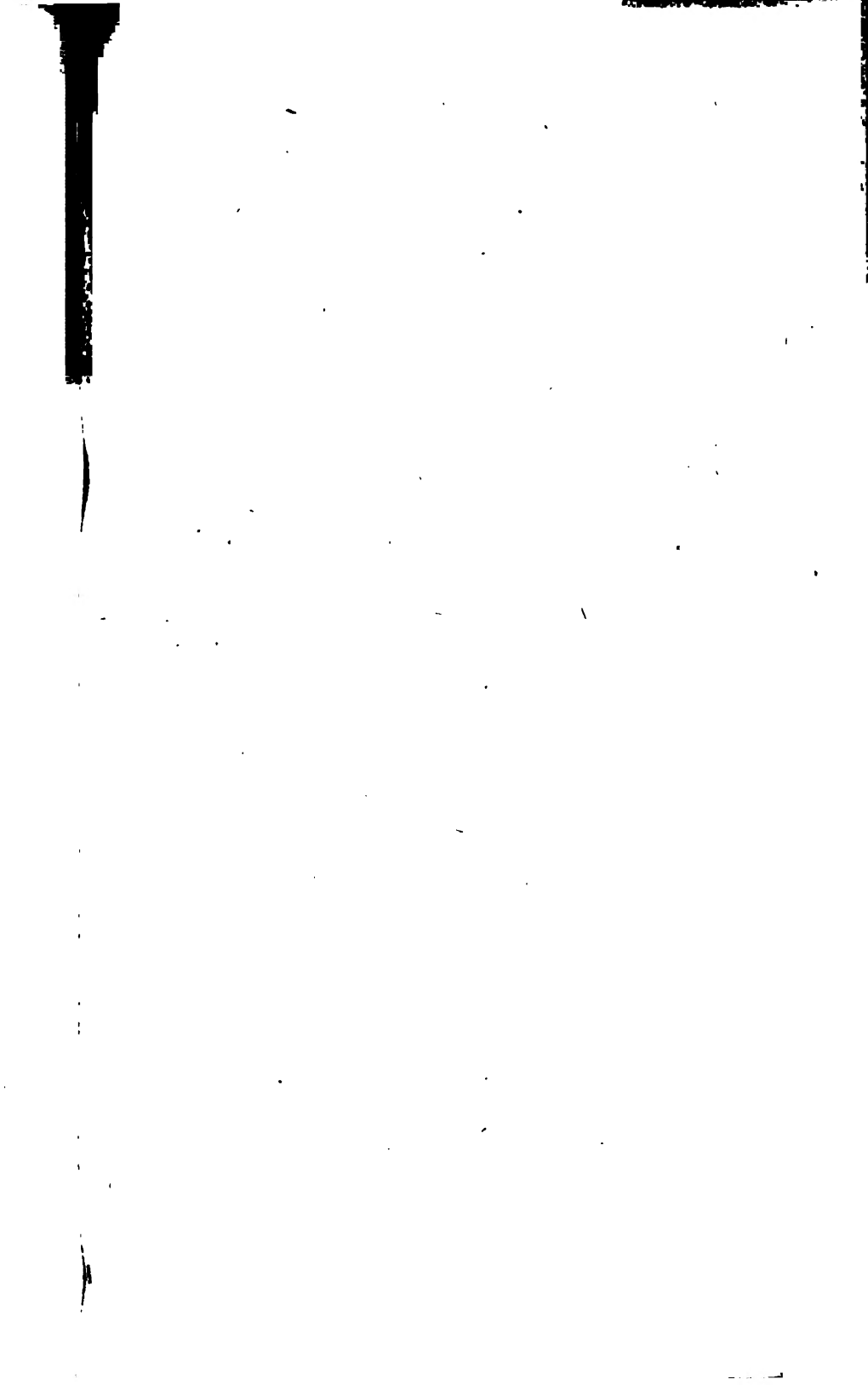
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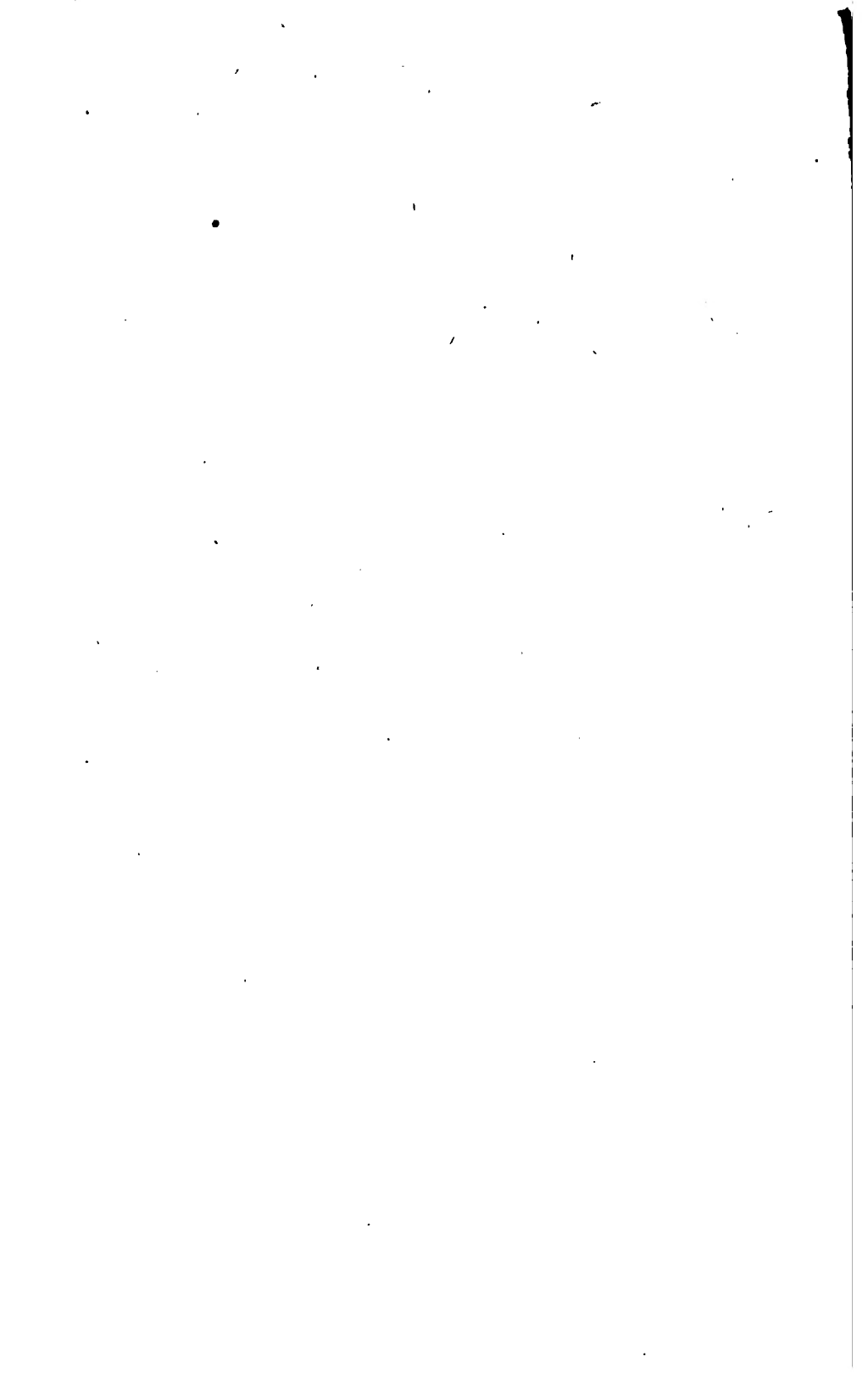


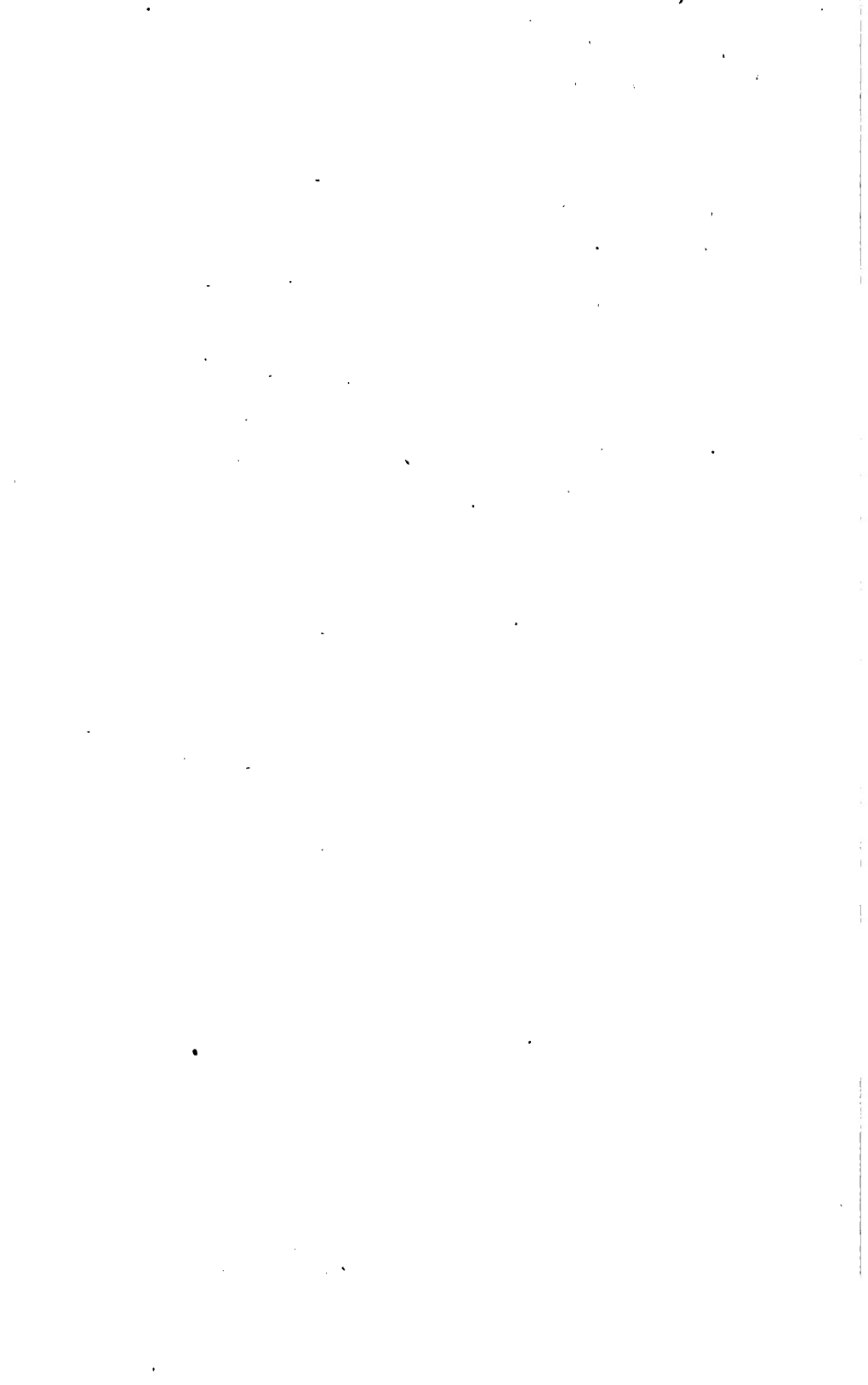


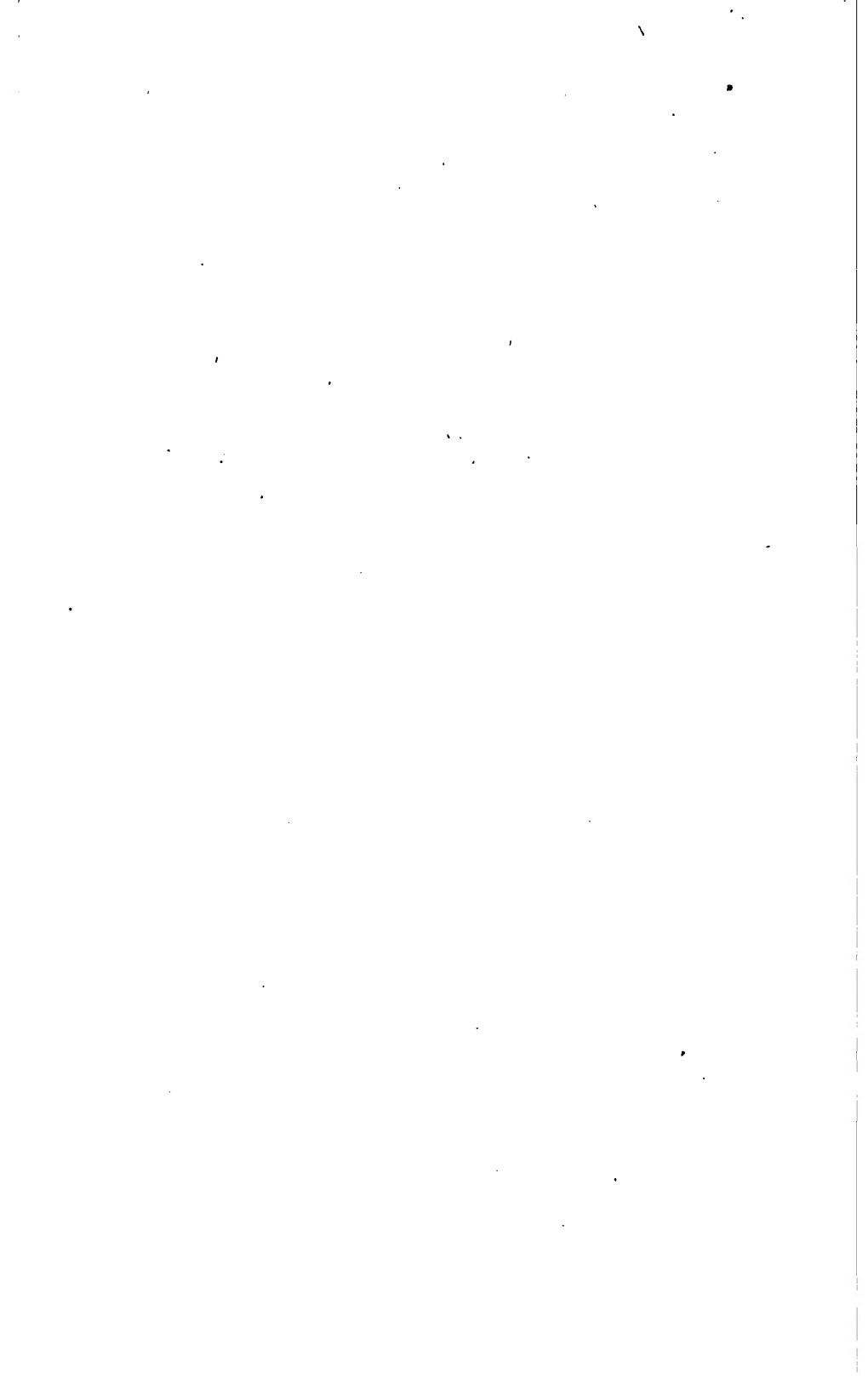
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THE
ONTARIO REPORTS,¹²⁸

VOLUME IX.

CONTAINING
REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE
HIGH COURT OF JUSTICE FOR ONTARIO,

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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JAMES F. SMITH, Q. C.

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OF THE
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REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[COMMON PLEAS DIVISION.]

MCCRAE V. BACKER.

*Sale of land—Title—Purchase money—Condition precedent—Costs—
Damages.*

On May 2nd, 1882, the plaintiff by agreement under seal sold certain land to defendant for \$856, \$156 to be paid on the execution of the agreement and the balance without interest on 1st January, 1883, the defendant covenanting to pay accordingly; and in consideration thereof the plaintiff covenanted to convey or cause the land to be conveyed in fee simple to defendant free from incumbrances, and to permit defendant to occupy same until default. By the agreement defendant also might assume possession, and might collect the rent then due from M., the tenant of the premises, and make arrangements with him for giving up possession. Defendant took possession, but was turned out by M., who claimed the land, and registered a *lis pendens* against it. Defendant in April, 1883, recovered judgment in ejectment against M., when M.'s solicitors undertook to, and on 17th October, 1883, did remove the *lis pendens*. In an action brought by plaintiff on October 12th, 1883, for the recovery of the purchase money.

Held, per CAMERON, C. J., following *McDonald v. Murray*, 2 O. R. 573, that shewing a good title was not a condition precedent to the recovery of the purchase money; and moreover the plaintiff's covenant was to convey or cause to be conveyed.

Per ROSE, J., that apart from *McDonald v. Murray*, the plaintiff was entitled to recover, for as the judgment in the ejectment action disposed of defendant's claim to the land, the existence of the *lis pendens*, which could be removed for \$5 or \$10, was no answer to the plaintiff's claim. The defendant also counter-claimed, setting up an agreement by plaintiff to pay the ejectment costs; and also claiming damages for being kept out of possession.

Held, that to entitle the defendants to recover these costs an unqualified promise to pay should be shewn, which the evidence failed to do; but as plaintiff admitted he intended to pay a portion of them he was charged with half; and he was disallowed interest for the time defendant was kept out of possession.

THE plaintiff, John McCrae, by agreement under seal, dated 2nd May, 1882, agreed to sell to the defendant, who agreed to buy from the plaintiff, a certain piece of land in the village of Brussels, for the sum of \$856, to be paid \$156 on the execution of the agreement, and the balance \$700, without interest, on the 1st January, 1883. The defendant covenanted with the plaintiff to pay him the said sum on the days and times and in manner mentioned. In consideration whereof and on payment of the said sum or balance of \$700 as aforesaid, the plaintiff covenanted with the defendant to convey and assure or cause to be conveyed and assured to the defendant, his heirs and assigns, by a good and sufficient deed in fee simple the land with the appurtenances freed and discharged from all dower and incumbrances upon such payment being made; also to permit defendant to occupy and enjoy the premises until default. The agreement also contained this special provision: "The said party of the second part (the defendant) hereby assumes the possession of the said lands and premises, and is to be at liberty to collect the rent falling due hereafter from Ronald McNaughton, the tenant of the said premises, and to make such arrangements as he may deem advisable with the said Ronald McNaughton for giving up possession of the premises."

The defendant entered into possession of part of the premises, so far as doing certain work in the garden, before the written agreement was signed, but McNaughton ordered the defendant's man off, and put his implements over the fence on to the street, some time after the agreement was executed. An action of ejectment was brought in the name of the defendant against McNaughton.

At the trial, which was in April, 1883, as it appeared, the title was not in the defendant, but in the plaintiff, the latter,

with his own consent, was made a party to the suit, and judgment was given for the plaintiff against McNaughton without costs, by reason of the necessity for making the plaintiff a party, and the defendant was put into possession under this judgment.

Before the sale by the plaintiff to the defendant, on the 19th day of April, 1882, McNaughton had commenced an action in Chancery against the plaintiff, alleging that a deed given by him of the land in question, with other lands, though absolute in form, was only in fact a mortgage given as security for an indebtedness of the said McNaughton to the plaintiff. After the trial of the ejectment suit, on the 19th day of October, 1883, a discharge of the *lis pendens* was duly registered, McNaughton's solicitors, at the trial of the ejectment suit, having agreed to remove the *lis pendens*.

On the 12th day of October, 1883, the plaintiff brought this action on the defendant's covenant to pay the \$700 on the 1st of January, 1883, the \$156 having been paid at the execution of the agreement.

The defendant in his statement of defence alleged that he was ready and willing to pay the \$700 on the 1st day of January, 1883, but that the plaintiff was not ready and willing to convey the land free from incumbrance, but that at that date a certain incumbrance, a certificate of *lis pendens*, was registered against the said land in a certain suit wherein Ronald McNaughton was plaintiff, and the plaintiff was defendant, which said *lis pendens* was also an incumbrance upon the said property at the commencement of this action.

And the defendant by way of counter-claim alleged that by the agreement he was to have possession of the land from the date of the agreement, and was to be at liberty to collect the rent from the said McNaughton alleged in the deed to be a tenant of the premises, whereas he was not a tenant, but was in adverse possession, as plaintiff well knew; and by reason thereof the defendant did not obtain possession for a year from the said date, and was deprived

of the advantages and profits which he would have derived therefrom, and he was put to great trouble and expense in ejecting the said McNaughton, and that after making said agreement the plaintiff authorized and requested him to take proceedings against the said McNaughton to eject him from the premises, and agreed to be responsible for all costs and expenses of effecting the same, and agreed to repay the defendant his necessary costs and expenses in connection therewith, and that he did incur necessary costs and expenses to the amount of \$150; and the defendant claimed the said sums from the plaintiff. The defendant also brought into Court the sum of \$400, and alleged that sum was sufficient to satisfy the claim of the plaintiff.

The action was tried before Wilson, C. J., without a jury, at Goderich, at the Fall Assizes of 1884, who found in favour of the plaintiff and directed judgment to be entered for him for \$265.65.

His finding was as follows :

"I find the plaintiff is entitled to recover from the defendant as hereinafter stated. I find the plaintiff is liable to pay the defendant half the costs of the ejectment action of Backer and the now plaintiff against McNaughton, and that the defendant is entitled to an allowance from the plaintiff for not getting possession of the premises in May, 1882, and not until May, 1883, equivalent to the interest on the \$700, the then unpaid balance of the purchase money, and also because the plaintiff could not make a good title to the defendant while the *lis pendens* in McNaughton against the now plaintiff remained in the registry office. I allow as follows :

Interest on balance of purchase money from	
20th October, 1883, till 26th November,	
1883, one month	\$3 50
The now unpaid portion of the \$700	300 00
Interest on the \$300 from 20th October,	
1883, till 27 September, 1884, say eleven	
months	16 50
	<hr/>
	\$320 00

And from that I allow the defendant half the costs of the ejectment, but not interest on the same, \$54.35; and I find the balance in favour of the plaintiff for \$265.65, and I give the plaintiff the costs of the action and stay all proceedings in this judgment for one month.

During Michaelmas sittings the defendant moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant, dismissing the action with costs, on the ground that upon the law and evidence plaintiff was not entitled to recover any judgment against the defendant; and that on the 1st day of January, 1883, and at the time of the commencement of the suit, there was an encumbrance, to wit, a certificate of *lis pendens* against the property; or, in the alternative, to vary the said judgment, and reduce the amount of the same, by further allowing to the defendant, by way of counter-claim, the sum of \$160, or such other sum as damages as to the Court shall seem right in respect of the use and occupation of the said premises for the year following the 2nd of May, 1882; and also the full amount paid by the defendant as costs of the action of ejectment.

During the same sittings, December 5, 1884, *Aylesworth* supported the motion. The *lis pendens* should have been removed prior to action commenced, and therefore the action was premature: *Dart* on V. & P., 5th ed., 959, 1104-5; *McDonald* v. *Murray* 2 O. R. 573; *Lovelace* v. *Harrington*, 27 Gr. 178; *Thompson* v. *Brunskill*, 7 Gr. 542; *Kilborn* v. *Workman*, 9 Gr. 255; *Gordon* v. *Harnden*, 18 Gr. 231. The taking possession by the defendant was because plaintiff represented that McNaughton was merely a tenant; and there was therefore fraud and misrepresentation. The finding of the learned Judge is in reality in the defendant's favour, and the judgment on the finding should have been for the defendant. The evidence supports the two grounds of counter-claim, namely, damages for not getting immediate possession, and the costs of the ejectment suit. The defendant admitted

that he had to pay some of the costs, and the defendant swears that he agreed to pay all of them, and the defendant's evidence is corroborated.

Shepley, contra. By the agreement the defendant agreed to assume possession, and this was after knowledge of all the facts; and clearly constituted a waiver of shewing title; at all events he waived it by subsequent conduct: *Commercial Bank v. McConnell* 7 Gr. 323, 326; *McDonald v. Garrett* 8 Gr. 291; *Mitcheltree v. Irwin*, 13 Gr. 537; *Rae v. Geddes*, 18 Gr. 217; *James v. Lichfield*, L. R. 9 Eq. 51. The counter-claim was not sustained by the evidence. No damages can be claimed for not getting possession, as the only damages the defendant could sustain would be the payment of interest, and no interest was payable by the agreement. There was no undertaking by the plaintiff to pay costs. The plaintiff expressly denies it, and the defendant's evidence on the point is not very clear. As to the action being premature. No title need be shewn before action brought. The Court may direct a reference as to title, when the title may be shewn: *Fry* on Specific Performance, 2nd ed., p. 576, sec. 1339; *McDonald v. Murray*, 2 O. R. 573.

February 28, 1885. CAMERON, C.J.—The case of *McDonald v. Murray*, 2 O. R. 573, which, I think, Mr. Aylesworth failed to distinguish in principle from the present case, is, as far as this Court is concerned, an authority in favour of the judgment for the plaintiff, and precludes the entry of judgment for the defendant, on the ground that at the time the action was brought there was an encumbrance registered against the plaintiff's title to the land.

On the facts the present case is more favourable to the plaintiff than they were in that case, as here, by the terms of the agreement, the plaintiff had the alternative of conveying if he had the title, or of causing it to be conveyed if he had it not, his covenant being upon payment of the balance of the purchase money on the 1st of January, 1883, to convey, or cause to be conveyed the lands to the

defendant. Here, also, as in that case, there was a time certain fixed for the payment of the purchase money, and the defendant's right to a deed was not to accrue till he made this payment.

At the trial I took a view unfavourable to the plaintiff in *McDonald v. Murray*, upon the ground that the person seeking to enforce the terms of an agreement for the sale or purchase of land must shew that he is in a position to perform his part of the agreement; and in the case of the vendor seeking to obtain the purchase money, or any portion of it, where the contract did not shew such payment was to precede the conveyance of the land, he was to shew title and the buyer was not bound to part with his money and rely upon the personal undertaking of the vendor for his protection. My judgment was overruled, and I am bound by the decision, which fully covers this case in principle.

The only remaining question is, should the judgment for the plaintiff be modified, either by reason of the costs paid by defendant in the ejectment suit, or the loss to the defendant of the occupation of the premises.

In the absence of an express agreement to indemnify the defendant for the costs of the ejectment suit, it is clear the defendant would have no claim for these costs, and the evidence does not unequivocally shew that the plaintiff undertook to pay them, the evidence as to this being conflicting, though from the plaintiff's own statement it is manifest he intended to bear at least a portion of these costs. He said: "After the agreement was signed, Mr. Backer remarked he was not going to all the expense of turning McNaughton out, and I said he would not be put to all the expense. I meant by that that I sympathized with Mr. Backer in the position he was in. I thought that Mr. McNaughton was wronging him, and I did not intend he should pay all the costs. I intended to allow him a little. The defendant, in his evidence, made different statements. At first he said plaintiff did not promise to pay the costs, but that he told him to bring the action. Then, again, he

said, plaintiff said I should go on and get the man off, and he would allow me for it: that he was afraid he (McNaughton) would do some depredation on him, and he would rather see me do it, and he offered me \$50 to offer McNaughton to go off."

The plaintiff denied this statement of defendant. There was thus a conflict of evidence, and I cannot say that the learned Chief Justice was wrong in the conclusion he arrived at. It does not follow that he believed the defendant by allowing him a portion of the costs, but rather that he discredited him, and he allowed a part on the plaintiff's own evidence.

Then as to the loss of occupation. The learned Judge set off the interest against that, and it does not appear that that was an unreasonable disposition to make of the rights of the parties in this respect.

I am inclined to think the defendant was not indisposed to bring the action against McNaughton in consequence of having turned his man off, when working in the garden; for, according to McNaughton's evidence, he knew all about McNaughton's claim before he entered into the agreement, and it was before the writing was signed, but after the verbal agreement, that defendant sent his man to work on the place.

On the whole I see no legal ground on which the judgment of the learned Chief Justice can be assailed, and am therefore of opinion the motion must be dismissed, with costs.

ROSE, J.—The plaintiff does not aver readiness and willingness to convey, but the defendant admits the promise to pay, and sets up that the plaintiff was not ready and willing to convey free from incumbrance, and that the incumbrance was the certificate of *lis pendens*. Issue was joined on this statement of defence, and the only issue therefore raised, apart from the counter-claim, was as to whether the existence of the certificate of *lis pendens* in the registry office against the title was a good and sufficient answer to the demand for payment.

The trial of the ejectment suit was in April, 1883, at which, as is stated by the learned Chief Justice of this Court, McNaughton's solicitors undertook to remove the *lis pendens*. That action, as will appear from the state-of facts, disposed of the question of McNaughton's right, title, or claim to the land, and the existence of the certificate, the costs of removal of which would not exceed \$5 or \$10, could not, it seems to me, afford any answer to the plaintiff's demand for the payment of the money.

It seems to me this case may thus be decided without reference to *Macdonald v. Murray*, 2 O. R. 573, which has been argued and is now standing for judgment in the Court of Appeal.

The case of *Thames Haven Dock Co. v. Brymer*, 5 Ex. 696, at p. 710 may be referred to as to the question of whether the plaintiff could have succeeded in this action without it appearing that he was able to convey the title.

This case is similar in many respects to *Mattock v. Kinlake*, 10 A. & E. 50.

I agree with the opinion expressed by the learned Chief Justice as to the other questions arising on the counter-claim, and think that the motion must be dismissed, with costs.

GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

BURNET V. HOPE ET AL.

Partnership—Death of partner—Contract of hiring.

Held, that a contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners. The plaintiff, who sued for wrongful dismissal, having received a letter from the firm in March, 1882, dispensing with his services from the 1st January, 1883, afterwards signed a receipt for his wages for December, adding, "and I am now leaving their employment." *Held*, that this was evidence for the jury of acquiescence in the termination of his engagement, more especially as he had made no claim for future wages.

THIS was an action brought to recover damages for wrongful dismissal.

The action was commenced on the 12th April, 1884.

The case was tried before O'Connor, J., and a jury, at Toronto, at the Fall Assizes of 1884.

In June, 1882, the plaintiff was engaged as a commercial traveller by the firm of Adam Hope & Co., of Hamilton, for a term of three years. In August, 1882, Mr. Adam Hope died and the firm went into liquidation. The plaintiff continued in their employ until December, 1882, when he finally left their service. The plaintiff alleged that with the exception of an engagement for a period of six months he had ever since been out of employment.

The jury assessed the damages at \$950.

In Michaelmas sittings, *Crerar* obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a nonsuit or verdict for defendants, on the following grounds: 1. The contract of hiring, if any existed, was dissolved and put an end to by the death of the Mr. Adam Hope. 2. The verdict is against the evidence and the weight of evidence. 3. For excessive damages. 4. And on the ground of misdirection by the learned Judge.

During Hilary sittings, February 10, 1885, *Moss*, Q.C., and *Crerar*, supported the order. The verdict is clearly against the evidence, and there was also misdirection in withdrawing the receipt from the jury. In any event

the defendant is entitled to a verdict on the law. The contract was put an end to by the death of Adam Hope. In *Tasker v. Sheppard*, 6 H. & N. 575, it has been expressly decided that the death of one of the partners of a firm puts an end to a contract of hiring, and this has been followed by all the subsequent cases. The plaintiff relies on *Connell v. Owen*, 4 C. P. 113, but this was decided prior to *Tasker v. Sheppard*, and is distinguishable, as that was a case of apprenticeship, the contract of apprenticeship being a peculiar one, and more strictly construed: *Addison on Contracts*, 8th ed., 454. They also referred to *Howell v. Coupland*, 1 Q. B. D. 258, 263; *Ellis v. Midland R. W. Co.*, 7 A. R. 464; *Cosgrave Brewing and Malting Co v. Starrs*, 5 O. R. 189 (a); *Boswell v. Sutherland*, 32 C. P. 131, 8 A. R. 233; *Fisher*, Dig. 181; *Addison*, on *Contracts*, 8th ed., 453, 460, 1243; *Chitty on Contracts*, 8th ed., 529, 668-9; *Shep. Touchstone*, 382; *Taylor v. Caldwell*, 3 B. & S. 826; *Lloyd v. Blackburn*, 9 M. & W. 363.

E. Meyers (of Orangeville), contra. The verdict cannot be interfered with on the evidence. The case went fairly to the jury and they found for the plaintiff. There was no misdirection. The learned Judge did not withdraw the receipt from the jury. The whole charge must be looked at. Then as to the law. In equity the defendants' contract was several as well as joint, and the two defendants now sued could equally as well have been sued during the lifetime of Adam Hope. The case of *Connell v. Owen*, 4 C. P. 113, is decisive in favour of the plaintiff. The other side say that *Tasker v. Sheppard*, 6 H. & N. 575, is opposed to it; but that case was decided on the particular form of the agreement, and in all the cases where the surviving partners were held not liable, there was something in the nature of the agreement which had that effect: *Beswick v. Swindells*, 3 A. & E. 868; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Jackson v. Bridge*, 12 Mod. 650; *Dobbin v. Fosler*, 1 C. & K. 323; *Gow on Partnership*, 2nd ed., 384-5;

(a) Since reversed in Appeal, not yet reported.

McLean v. Kennard, 43 L. J. N. S. Ch. 323; *Bradbury v. Morgan*, 1 H. & C. 249; *Lindley*, on Partnership, 4th ed., 404; *Brown v. Gordon*, 16 Beav. 302.

Moss, Q. C., in reply. The principle laid down in the cases is just the reverse of that stated by the other side. In every case where the agreement was held binding on the surviving partners there was something in the agreement which had that effect, namely, where the agreement was with the partners, their executors, administrators and assigns.

February 28, 1885. GALT, J.—As respects the second ground, I have seldom met with a case in which the verdict was more entirely against the weight of evidence than it is in the present. The plaintiff was the sole witness, and with the exception of the term of his engagement he was contradicted on every other point of his evidence by numerous disinterested parties.

On this ground alone the verdict should be set aside.

As to the fourth objection: With great respect to the opinion of the learned judge, I think he was in error as respects one piece of written evidence, and on this ground also there should be a new trial with costs to abide the event.

The objection is this: After the firm had had gone into liquidation, the plaintiff continued in the service of the new firm until the end of December, when he went into the office of the cashier to receive payment of his salary. A book was produced, in which it was the custom of the old firm and of the new to take receipts from their servants and travellers. It had been proved that the plaintiff had previously received notice that his services would not be required after the end of the year by a letter, dated December 1st, 1882, as follows:

"Trade has been so quiet of late that we are forced to curtail our staff, as we mentioned to you before going out, and we deeply regret requiring to ask you to be on the look out for a situation for January 1st, 1883. The con-

nection, though of short duration, has been of such a pleasant character that we regret it the more."

With this letter in his possession, the plaintiff on receiving his month's salary at the end of December signed a receipt in the following terms:

"Received seventy dollars salary for December, and I am now leaving their employment."

The learned Judge was of the opinion that these latter words was merely the statement of a fact, viz., that he was leaving the employment of the defendants, and did not mean that he was acquiescing in such termination of his engagement.

This was the view taken by him, and he declined submitting any question on it to the jury.

We think that such a question should have been submitted to them, more especially as there is no evidence whatever that from that time until the commencement of this suit, at any rate until shortly before this action, the plaintiff ever made any claim on the defendants or ever offered his services. Speaking for myself, had the case been tried before me, I should, if I had felt myself constrained to decide the matter without reference to the jury, have dismissed the plaintiff's action.

The first objection remains to be considered, namely: "The contract of hiring, if any existed, was dissolved and put an end to by the death of Mr. Adam Hope."

Mr. Hope was head of the firm, which very shortly after his death went into liquidation.

The case of *Tasker v. Sheppard*, 6 H. & N. 575, appears to be in point. The plaintiff had entered into an agreement in writing with the defendant and another person, who were then in partnership, to act as their sole agent for a term of four years and a half. The other person died during the term. Breach, that the defendant did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half, &c. On demurrer, held that the parties contracted with reference to the then existing partnership business, and that the con-

tract was to employ the plaintiff for a period of four years and a half, subject to the condition that all parties so long lived. This case is cited by Mr. *Lindley* in his treatise on Partnership, 4th ed., 209, who quotes it as establishing a clear principle, that where a contract of service is made with a firm the surviving partner is under no obligation to continue an agent in his employ.

Mr. Meyers relied strongly on the case of *Connell v. Owen*, 4 C. P. 113. This, however, was a case of apprenticeship, and not of a servant. It was, moreover, decided some years before *Tasker v. Sheppard*.

In my opinion the contract terminated on the death of the senior partner, and therefore this action should be dismissed, with costs.

CAMERON, C. J., and ROSE, J., concurred.

Order absolute.

[COMMON PLEAS DIVISION.]

ADAIR V. WADE.

Seduction—Assessment of damages by judge without jury—Service of writ of summons—Evidence of—New trial.

In an action of seduction no appearance was entered, the plaintiff then filed a statement of claim to which no defence was made, and interlocutory judgment was signed, and notice of assessment of damages given. The defendant did not appear at the trial and a jury was called who disagreed as to the amount of damages, and were discharged. The learned Judge then tried the case himself without a jury, upon a fresh taking of evidence, and assessed the damages, and gave judgment for the plaintiff.

Seemle, that under the O. J. Act and former practice, the learned Judge in such an action had no power to dispense with the jury.

Quare, whether, in any event, a jury having been called and disagreed, they could be dispensed with, and a retrial had without a new notice; but it was unnecessary to decide the point, as it was not satisfactorily established that the writ of summons had been served on the defendant; and he was therefore allowed to have a trial on the merits.

THIS was an action of seduction, sent down to the last sittings of this Court at Goderich, for assessment of damages. The Chief Justice of the Queen's Bench Division presided. The defendant did not appear to the writ of summons. The plaintiff filed a statement of claim. No statement of defence was entered. Interlocutory judgment was signed, and notice of assessment of damages was given for said sittings.

The defendant did not appear.

When the case came on a jury was called. What took place appears from the following entry of the learned Judge at the trial :

"The pleadings do not require trial by jury, but a jury was called, and disagreeing as to the amount of damages I discharged them from making an assessment, and I said I would assess the damages upon a fresh taking of evidence myself." He added: "If a jury should assess the damages, I dispense with a jury."

The learned Judge assessed the damages at \$400, and gave judgment for the plaintiff for said amount, with costs.

During Hilary Sittings the defendant moved to set aside this finding or assessment, and the judgment entered pursuant thereto, on the ground that the learned Judge had no power to do as he has done. He also moved on affidavits to set aside all the proceedings subsequent to the writ of summons, on the ground that he was not served therewith, and had no notice of the proceedings.

During the same sittings, February 13, 1885, *J. K. Kerr*, Q.C., supported the motion.

Aylesworth, contra.

The arguments sufficiently appear from the judgment.

February 28, 1885. ROSE, J.—The statutes, rules, and orders regulating the assessment of damages are as follows : Rule 206, O. J. A. provides that “If the plaintiff’s claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 2,” *e. g.*, in delivering a defence “the plaintiff may enter an interlocutory judgment against the defendant, and the value of the goods, and the damages, or the damages only, as the case may be, shall be assessed as hitherto.”

This reference to the former practice takes us back to the R. S. O. ch. 50, sec. 152, which is as follows : “No writ of enquiry shall issue to a sheriff in cases of judgment by default, but except in cases where the judgment is final as aforesaid, the damages, when to be assessed by a Judge or jury, shall be ascertained at the same time and in like manner as if the parties had pleaded to issue, and the entries shall be made on the roll accordingly.”

In this case if the parties had pleaded to issue the trial would have been governed by sec. 252 of the C. L. P. Act, R. S. O. ch. 50.

It is as follows : “In actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, and false imprisonment, all questions which might heretofore have been tried by a jury shall be tried by a

jury, unless the parties in person or by their attorneys or counsel waive such trial."

If an assessment of damages is included within the words "questions * * tried by a jury," it would seem clear that there was no power to dispense with a jury, and that a jury, and not a Judge, must assess the damages.

Sec. 253 may throw some light on the construction to be placed on these words.

It is as follows: "All other issues of fact in any civil action, when brought in any of the Superior Courts, or in any of the County Courts, and the assessment or enquiry of damages in every *such* action, may, and (subject to the provisions of the two hundred fifty-fifth section) in the absence of such notice as in sub-section two of this section mentioned, shall be heard, tried, and assessed by a Judge of the said Courts without the intervention of a jury."

In this section we have all civil actions other than those mentioned in sec. 252 provided for; and in such civil actions, other than libel, &c., it is provided that the issues of fact and the assessment or enquiry of damages shall be heard, tried, and assessed by a Judge.

In sec. 252 no provision is made in terms for assessment of damages, unless covered by the words "questions * * tried by a jury;" and sec. 253 does not refer to libel, &c., so that in such cases no provision is made for assessment of damages, unless as I have said the words of sec. 252 are wide enough to cover such a case.

I am inclined to think they are wide enough. The plaintiff says: "You are guilty of seduction, and I have suffered damage." The defendant says: "I am guilty, but you have suffered no damage." The jury are called; they hear such evidence as may be offered; try the question, and say, as in this case: "We are unable to agree as to what damage the plaintiff has suffered."

It will be observed that the language in sec. 252 is "questions;" in sec. 253 "issues of fact." The former would seem the wider.

It is clear the learned Chief Justice was not quite decided as to the practice from the entry, "If a jury should assess the damages, I dispense with a jury."

If a jury should have assessed the damages, unless the interlocutory judgment deprived the defendant of his right to claim a jury, no waiver of such mode of trial was given.

I do not think such right was taken away for the reasons above given.

The question was also raised as to the power, after a jury had been called and disagreed, to dispense with them, and have a retrial without a new notice of trial. Whether the learned Judge had the power to do as he did, I am not able to come to the conclusion that the case for the plaintiff, as to the service of the writ of summons, is so clearly made out as to justify a refusal to allow the defendant to have a trial on the merits.

There is much contradictory swearing. Some one is committing perjury.

In my opinion it would be more satisfactory to allow the defendant to file a statement of defence, and have the case go down to trial at the next sittings, the judgment and execution to stand in the meantime as security. Costs in the cause to the successful party.

CAMERON, C. J., and GALT, J., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

COPELAND V. THE CORPORATION OF THE VILLAGE OF
BLENHEIM.

Municipal corporations—Highway—Negligence—Contributory negligence—Improper rejection of evidence—Result not affected thereby—O. J. Act, Rule 311.

A building was being erected on a street in the village of Blenheim. It had a basement several feet deep, the joists of the first floor being about level with the side walk. For the purpose of excavating the basement planks for the distance of twenty feet had been removed from the sidewalk, and the earth taken away so as to form a grade into the basement, planks being laid across the space so made. In the centre of the basement wall where the door-way was, there was a hole made by the grade into the cellar. During the daytime a plank was laid from the planks across the sidewalk to the first floor, which it was customary to remove at night, and there was no direct evidence that it was not removed on the night in question. On the outside of the sidewalk there was a pile of stones and bricks, and the road was muddy. The plaintiff who knew of the dangerous character of the place, was at night going along the sidewalk, and while in front of the building met two persons. He then stepped to the right on to the ground next to the building, standing still till the persons had passed by, when on attempting to proceed himself, he struck against something and fell into the hole made by the grade into the cellar, and was injured.

Held, that the defendants were guilty of negligence ; and that there was no evidence of contributory negligence on the plaintiff's part. The testimony of a witness, since deceased, taken on a former trial, was rejected by the Judge at the trial herein :—*Held*, that although improperly rejected, yet other evidence to the same effect having been received, it could not be said that the result would have been varied by the admission, and a new trial was accordingly refused.

THIS was an action for damages resulting to the plaintiff from falling into a hole in the sidewalk on Talbot street, in the village of Blenheim.

The case was tried before His Honor Isaac J. Toms, Judge of the County Court in the county of Huron, sitting for Wilson, C. J., and a jury, at the last sittings of this Court for trials at Chatham.

The jury in answer to certain questions found that the accident was caused by the negligence of the defendants, negatived contributory negligence, and assessed the damages at \$500. The judgment was accordingly entered for the plaintiff.

In Michaelmas sittings, *Meredith*, Q. C., obtained an order *nisi* to set aside the verdict and for a new trial, on the ground that the verdict was contrary to law and evidence, and the Judge's charge, and was excessive; or for the entry of judgment for the defendant, on the ground that the plaintiff's evidence shewed contributory negligence.

During Hilary sittings, February 16, 1885, *Meredith*, Q. C., supported the order *nisi*. Before proceeding with the argument he applied for and obtained leave to amend the order *nisi* by adding the grounds of rejection of evidence. The evidence shews that the plaintiff was well acquainted with the place, and knew of its dangerous character, and had passed it on the day of the accident. At the time of the accident it could be plainly seen. There was also a sidewalk there, but the plaintiff, instead of using the sidewalk, chooses to go off it on to the ground next to the building where it was dangerous. If he had kept on the sidewalk the accident would not have happened. It is clearly proved that a boy who passed by the place a few minutes before the plaintiff, saw the sidewalk and walked over it. There is no evidence of negligence in the defendants, as they have the right to permit persons to use a portion of the highway for the purpose of building; and there was such contributory negligence in the plaintiff as would prevent his recovery. The plaintiff's own forgetfulness of a danger known to him was the cause of the accident, and this would excuse the defendants from neglect to use precautions to prevent accidents even if such neglect had been shewn. The evidence shews that the accident was caused solely by the plaintiff's omission to use the care which any reasonable man would have used. It also appears by the plaintiff's evidence, that the accident was caused by his coming in contact with a plank placed by the persons erecting the building from the sidewalk to the building, and the defendants clearly cannot be held responsible for this. Under the authorities there is no liability: *Burns v. Corporation of Toronto*, 42 U. C. R. 560; *Hutton v. Corporation of Wind-*

34 U. C. R. 487; *Davey v. London and South Western R. W. Co.*, 11 Q. B. D. 213, in Appeal, 12 Q. B. D. 70; *Ray v. Corporation of Petrolia*, 24 C. P. 73. There was also improper rejection of evidence. The evidence given by Joseph Earl on the first trial, and since deceased, should have been received. The evidence of what a deceased witness stated on a former trial is clearly admissible.

Pegley, contra. As to the rejection of evidence. Under the O. J. Act, Rule 311, rejection of evidence is not a ground for a new trial, unless some wrong or miscarriage is occasioned thereby, and evidence equally as strong as the evidence rejected was submitted to the jury, and they chose to accept the plaintiff's version of the accident, and to find for him; and the Court cannot therefore say that if the evidence had been received the verdict would have been different. There is no question but that the place was most dangerous, and the strongest argument in the plaintiff's favour is, that after the accident the defendants put a fence around the place. The whole question was one of fact, and was submitted to the jury, and the Court should not interfere. In fact, at the trial, the defendants did not attempt to disprove negligence on their part, but they based their defence on three grounds: 1. Contributory negligence; 2. That plaintiff was suffering from rheumatism, and 3. That he was suffering from a previous accident, namely, a fall from a building. These matters were all left to the jury, and they have found for the plaintiff. There is no question now but that contributory negligence is a question of fact for the jury. It is clearly laid down that the mere fact that a traveller is familiar with the road, and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it. Such knowledge is a circumstance, and perhaps a strong circumstance; but it should be submitted with the other facts of the case to the jury, for them to determine whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous or in proceeding used ordinary care to avoid injury: *Shear-*

man and Redfield on Negligence, 3d ed, p. 492, sec. 414. See also *Maw v. Corporation of King and Albion*, 8 A. R. 248; *Slattery v. Dublin and Wicklow R. W. Co.*, 3 App. Cas. 1155; *Peart v. Grand Trunk R. W. Co.*, 10 A. R. 491.

February 28, 1885. ROSE, J.—It appears that one Hughson was erecting a building on the north side of Talbot street, in the fall of 1883. The building had a basement several feet in depth, the joists of the first floor being about level with the sidewalk. The building was flush with the line of the street or sidewalk. In order to excavate for the basement story it was necessary or convenient to take the earth out to the street, and the planks for a distance of about twenty feet were removed from the sidewalk and the earth taken away from where the planks had been, so as to form a grade leading from the roadway into the cellar for the carriage of the earth from the excavation.

When the foundation or basement wall was erected, there were three openings left in it, one in the middle for a door, and one on each side of the door for windows.

The open space between the wall and the road way still remained. What its exact size was is not quite certain, but it appears clear that in front of the door way it was open from the level of the street, and graded down to the bottom of the door and thence into the cellar, for it was used for the purpose of rolling stones down into the cellar for use by the masons in building the wall.

It did not extend across the sidewalk, which was ten feet in width. It probably extended some three or four feet, and according to some of the witnesses there was an opening the width of the building varying in width. This is perhaps not very material.

One or more planks were laid across the open space in the sidewalk reaching from one end to the other of the open space.

The plaintiff did not recollect any planks being there, and the evidence is somewhat conflicting as to the actual number.

It was the custom of the men while working during the day to place a plank from these planks which formed a crossing between the ends of the sidewalk to a plank laid across the floor joists for the purpose of wheeling bricks from a pile on the street into the building for use by the bricklayers.

It was the custom to remove this plank at night, and there is no direct evidence that it was not removed on the night in question.

The plaintiff knew of the dangerous character of the place, and had passed by it on the day in question.

I should have noted that on the outside of the walk were a pile of stones, and a pile of brick, and at the time the road was muddy.

On the night in question about seven o'clock of the 3rd of December, 1883, the plaintiff going along the sidewalk from east to west while in front of the building in question met two persons going eastward. They passed to the right, and he therefore to the right. This would of course bring him near the building, and if he had been walking on the plank or planks temporarily laid down caused him to step off and to walk upon the earth.

After stepping off the planks he stood still until they passed him, and then passed on when, according to his statement, his foot struck against something, and he fell into the hole in question, being the hole made by the grade into the cellar, and sustained the injuries complained of.

It is clear on the authorities to which reference has been so often made in this class of cases, that the municipality had no right to allow such a hole to remain in the street unguarded. It was not contended that it had not been there sufficiently long to constitute notice ; and the evidence was, I think, reasonably clear that no light shone upon the spot. Certainly none was placed there to warn passers by.

There was ample evidence to sustain the finding of negligence on the part of the defendants.

It was contended, however, that the plaintiff had been guilty of contributory negligence in walking upon the earth at all: that knowing the dangerous nature of the place, the fact that planks were placed there, and that he was walking upon the earth, was sufficient notice to him of the danger, and that if he negligently walked along, and unthinkingly fell into the hole, the damage was caused, not by the defendants' negligence, but by his own in not avoiding the danger.

This assumes that a plank or planks were laid down: that he had been walking upon them: and that he stepped off from them to the ground. It also assumes that, if it was necessary or proper for him to step off the planks, he should have remained perfectly still until those passing eastward had gone by, and then have stepped on the planks again, and thus proceeded on his way. If, however, he had not noticed the planks, or had not been walking upon them, this contention must fail. It allows no room for forgetfulness, and would relieve the defendants from the results of their negligence by requiring from the plaintiff a degree of care which it seems to me the Courts have not yet required.

It must be remembered that the onus is on the defendants to satisfy the jury that the plaintiff was guilty of contributory negligence: that it is not on the plaintiff to shew that he was not so guilty.

I refer to the case of *Peart v. Grand Trunk R. W. Co.* lately decided in the Court of Appeal, 10 A. R. 191, and since, I believe, appealed to the Privy Council, as answering Mr. Meredith's argument, that if the plaintiff is shewn to have been forgetful of a known danger, the defendants would be excused from the consequence of neglect to observe precautions which probably would have aroused him from such forgetfulness.

So long as the judgment in that case stands unreversed, I think a verdict on this evidence cannot be successfully impeached.

It was further contended that the cause of the accident was not the opening, but the object against which his foot struck.

The jury have expressly found that it was not the plank used for wheeling brick into the building, and there is no evidence to shew what the obstruction was.

Even if such an argument were entitled to prevail to any extent, it seems to me it could only prevail to free the defendants from any damage which the plaintiff would have suffered from falling on the ground had there been no opening or hole.

It appears that the injury here was caused by falling into the hole.

The hole was there by the negligence of the defendants, and, without doubt, they must be answerable for such damage.

It was admitted that the damages were not excessive, if the plaintiff was entitled to recover. None of the medical testimony shewed that the results of an accident such as the plaintiff alleged could not have been such as the plaintiff suffered.

There remains the question of rejection of evidence, which was not taken in the order *nisi*, but as to which permission was given on the argument to amend.

This was the second trial, the jury disagreeing at the first.

On the first trial a witness by the name of Joseph Earl was examined on behalf of the defendants. He stated that prior to the 3rd of December, 1883, he met the plaintiff, who was limping, and in reply to a question by witness, said he had fallen off a building and hurt himself.

Earl died prior to the second trial.

Mr. Meredith proposed to prove what he had stated at the first trial, but on objection the evidence was not received.

It is clear that evidence of what a deceased witness testified on a former trial between the same parties with reference to the matter in dispute is receivable, and should

not have been rejected : *Switzer v. Boulton*, 2 Gr. 693, and *Sutor v. McLean*, 18 U. C. R. 490, may be referred to.

By Rule 311, O. J. A., such rejection is not a ground for a new trial, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned.

I am unable to say that is the case here. Three witnesses testified to the same statement. The plaintiff denied making any such statement, and explained the cause of the accident to which, it seems to me, the evidence of these witnesses referred.

The jury accepted the plaintiff's evidence and gave credence to it, or at least did not deem such statement, if made, of sufficient importance to disentitle him to their verdict. I do not think one more witness to the same statement would have or should have varied the result.

It seems to me on all grounds the defendants fail and that the order *nisi* should be discharged, with costs.

CAMERON, C. J., and GALT, J., concurred.

Order nisi discharged.

[COMMON PLEAS DIVISION.]

WEBSTER V. HAGGART ET AL.

Award—Misconduct of arbitrator, what constitutes—Reception and rejection of evidence—R. S. O. ch. 50, sec. 289—Investigation of long accounts—Consent reference—Right of appeal.

The improper reception or rejection of evidence by an arbitrator, without any corrupt intent, does not amount to legal misconduct upon which an award will be set aside.

The evidence received consisted in statements made by the plaintiff *ante litem motam* in substance confirmatory of his evidence before the arbitrator; and the rejection consisted in the arbitrator's refusal to receive parts of the plaintiff's examination without the whole being received. It did not appear that the arbitrator was influenced by the evidence objected to, and he made no request to be allowed to reconsider his award.

Held, that while the evidence objected to was not strictly admissible, the award could not be interfered with on such ground, and especially so since R. S. O. ch. 50, sec. 289, when it did not appear to have occasioned any miscarriage on the merits.

The order of reference made by the presiding Judge at the Assizes was: "Upon the consent of the parties, I do order and direct that the matters in dispute between the plaintiff and defendant upon the issues joined in this action be referred," &c. It was urged that the action being one which involved the investigation of long accounts, the reference must be deemed to have been made compulsorily, and the consent to have been merely to the arbitrator named. It appeared that, as a matter of fact, the learned Judge exercised no discretion, but, on the parties announcing their consent, he made the order; and at the time suggested the insertion of a clause authorizing an appeal, if such were desired, but it was not required.

Held, that the reference was a consent reference, and there was no appeal. Actions involving the investigation of long accounts will not be referred as a matter of course. There is nothing to prevent parties agreeing to a consent reference of all matters in dispute in an action, even though involving investigation of long accounts.

THIS was an application by order *nisi* to set aside an award made by Robert M. Fleming, a barrister, to whom by consent of the parties the cause was referred by Cameron, C. J., holding the Assizes at Brompton, in the Spring of 1884.

During Michaelmas sittings, December 2nd, 1884, *Osler*, Q. C., and *Justin* (of Brompton), supported the order. The object of this motion is as a precautionary step in case the Court should hold that there is no appeal under the sections authorizing an appeal within fourteen days from the

filing of the award. This is clearly a compulsory reference: *Wilson v. Richardson*, 43 U. C. R. 365; if so it would come within sec. 209 of R. S. O. ch. 50, and a motion must be made within the first six days of the term next following the publication of the award to the parties, whether such award be made in vacation or in term. If, however, this is a voluntary submission, then sec. 206 applies, and the defendant has the right to move before the last day of term. The defendant has therefore moved within such time. If the case comes within the sections authorizing an appeal within the fourteen days, then the defendants have still the time to move, by way of appeal, against the award. There was clearly legal misconduct on the part of the arbitrator. The arbitrator received improper evidence, namely, statements made by the plaintiff to third persons in corroboration of the plaintiff's evidence. The arbitrator also rejected the portions of the depositions tendered in evidence, because the whole of the depositions were not put in. The reception of improper evidence or the rejection of evidence is clearly mistake in law. They referred to *Chitty's Statutes*, 4th ed., vol. i., p. 160: *Re Hall and Hinds*, 2 M. & G. 847; *Royers v. Dallimore*, 6 Taunt. 111; *MacLennan's O. J. Act*, 2nd ed., 82, and cases there cited.

Milligan (of Brampton), contra. This was a voluntary submission by consent, and therefore there is no power to move against the award. This has already been disposed of by the authorities: *Tanner v. Sewery*, 27 C. P. 53; *Nagle v. Latour*, 27 C. P. 137; *Walker v. Beaver and Toronto Mutual Fire Ins. Co.*, 30 C. P. 211. There was clearly no misconduct on the part of the arbitrator. It has been laid down that admission or rejection of evidence by an arbitrator does not constitute misconduct; and it is not shewn that the arbitrator was influenced by the reception of the evidence: *Buller's N. P.*, 7th ed., 294; *Fisher's Dig.*, p. 3087. There was no power to put in part of the depositions. Either the whole of the depositions must be put in, or not at all. The 42 Vic. ch. 15, sec. 3, O., which

authorizes depositions be put in evidence, does not apply to arbitrations.

December 20, 1884. CAMERON, C. J.—The submission did not provide for an appeal, and this application was based on the alleged illegal misconduct of the arbitrator in receiving improper evidence and the rejection of evidence.

It was only in a legal sense the conduct of the arbitrator was impugned, it being conceded that he was not actuated in receiving the evidence complained of by any wrong motive.

The improper reception of evidence was the admission of evidence by one Scott and one George Webster, witnesses called by the plaintiff, to shew that the plaintiff had *ante litem motam* made statements which were in substance confirmatory of the plaintiff's evidence given before the arbitrator. The evidence was admitted subject to the objection. The arbitrator declined to receive parts of the plaintiff's examination without the whole being read. He made his award in favour of the plaintiff, but it was not made to appear that he was influenced by the evidence objected to, and he made no request to be allowed to reconsider his award.

It was conceded by Mr. Osler that the Court could not review the decision of the arbitrator on the merits. The cases cited of *Nagle v. Latour*, 27 C. P. 137; *Tanner v. Sewery* in the same volume, p. 53, and *Walker v. Beaver and Toronto Mutual Fire Ins. Co.*, 30 C. P. 211, are clear authorities against our so doing, and they fully accord with the English decisions.

But he contended the improper reception of evidence or the rejection of admissible evidence amounted to legal misconduct, and entitled the defendants to impeach the present award.

The authorities are, however, quite as decidedly opposed to his contention as they are against the right of the Court, in the absence of the right of appeal, to interfere on the merits.

In *Hagger v. Baker*, 14 M. & W. 9, it was held that an arbitrator who received the plaintiff's books in evidence, and entries made therein by the plaintiff and his clerks, had not misconducted himself so as to avoid the award made by him in the plaintiff's favour.

Baron Pollock, in that case said, at p. 10: "The general rule is, that if an arbitrator makes a mistake which is not apparent on the face of the award, the party injured has no redress; and there is no difference between a mistake in the law of evidence and in other matters. If no corruption be shewn, the Court ought not to interfere. Besides it does not appear that the arbitrator founded his award upon the entries in these books; he may have examined them merely for the sake of informing his conscience, without any intention of acting upon them."

The power of the Court is very fully discussed in *Dinn v. Blake*, L. R. 10 C. P. 388, and many of the authorities reviewed. The head note of that decision, fully borne out by the texts of the several judgments delivered, is, that: "An award will not be sent back to an arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake."

It is to be observed when *Hagger v. Baker* was decided a party could not give evidence in his own behalf, and so it was more dangerous to look at the entries he had made in his books than to receive evidence of statements made by him confirmatory of what he swore to. Such confirmatory evidence does not go to support the fact deposed to, but does support the belief of the plaintiff in its correctness.

It would be better not to receive such evidence, as it is probably not strictly admissible, and can do very little harm or good.

In the present state of the law, which provides that where a Court improperly admits evidence or misdirects a jury, such admission of evidence or misdirection shall not avoid the finding of the jury unless there has thereby been

occasioned a miscarriage on the merits, there is less reason for giving effect to the objection raised on this application than there would have been before the passing of the Act, R. S. O. ch. 50, sec. 289.

In the view we have taken it becomes unnecessary to determine whether Mr. Milligan's objection to the delay in making the application is well taken.

The order *nisi* must be discharged, with costs.

GALT and ROSE, JJ., concurred.

Order nisi discharged.

In this case a motion was subsequently made by way of appeal from the award of the learned arbitrator, before Rose, J., who enlarged the same to the sittings of the Divisional Court.

During the Hilary Sittings, *Osler*, Q. C., and *Justin*, of Brampton, supported the motion.

Milligan, of Brampton, contra.

The arguments and cases cited sufficiently appear in the judgment.

February 28, 1885. ROSE, J.—This motion came on before me in single Court and I enlarged it into the full Court, as we had at the former sittings of the Divisional Court heard a motion against the award as if the reference had been by consent at Common Law. We then held that as no ground for misconduct had been made out we could not interfere.

This motion is made to enable the defendant against whom the award has been made to have the evidence reviewed.

It was contended that the reference was a compulsory one under the provisions of sec. 195, R. S. O. ch. 50, and admitted that if it was a reference by consent and not under sec. 195, this motion must fail.

The order of reference was in terms upon consent, the opening words being "Upon the consent of the parties I do order and direct that the matters in dispute between the plaintiff and defendant, upon the issue joined in this action, be referred," &c.

It was contended, however, that as the action involved the investigation of long accounts, and was therefore such an action as would be compulsorily referred, the consent must be taken to be to the arbitrator named, and not generally to the reference.

As a question of fact outside of the order, the learned Chief Justice has no doubt, as he stated during the argument, that he exercised no judicial discretion in making the order: that the parties announced the fact of their consent; and that he directed their attention to the necessity of inserting a clause enabling an appeal to be taken, if so desired, and that it was not desired to insert such clause.

It does not follow as a matter of course that all actions involving the investigation of long accounts will be referred. On the contrary a Judge would prefer, if time permit, to save the parties the great expense of such a reference, by disposing of such matters of account himself.

It does not appear why parties may not have a consent reference of all matters in dispute in an action, even if they involve the investigation of long accounts.

I gave great attention to Mr. Osler's argument to see if any authority could be cited to support his contention, for, from his statement of the evidence, I was desirous of examining it to see if his clients were as much entitled to relief as he contended. I certainly was much impressed by the forcible way in which he marshalled the facts; and if, upon a perusal of the evidence, I had come to the conclusion that his contention was supported by the evidence, I would have been of opinion that the appeal should have been allowed, were the matter appealable.

The authorities cited were, *Russell* on Awards, 6th ed., p. 375, founded on *Longman v. East*, (3 cases), 3 C. P. D. 142; *Wilson v. Richardson*, 43 U. C. R. 365.

Mr. Milligan cited contra, *Tanner v. Sewery* 27 C. P. 53 ; *Nagle v. Latour*, 27 C. P. 137 ; *Walker v. Beaver and Toronto Mutual Fire Ins. Co.*, 30 C. P. 211.

I have carefully perused *Longman v. East*, 3 C. P. D. 142, but I do not find that it is an authority in the defendant's favour. I think it is quite the contrary.

There it was contended that the order expressed to be by consent was not by consent; but the Court would not hear the contention, holding that, if the order had been wrongly drawn up, an application should have been made to the Judge making it to vary its terms. It is clear such an application would not have been successful in this instance upon the facts I have above stated. The parties were held bound by the terms of the order in that case, and to have become parties to a reference pure and simple. I refer to p. 151 of the report.

In *Wilson v. Richardson*, 43 U. C. R. 365, at p. 368, the learned Chief Justice said in reference to a similar contention : " Throughout it is expressed as being a reference by consent, or voluntary reference. If this was not the true character of the reference, the defendant, instead of making the order a rule of Court, should have had the order amended, and as amended made a rule of Court."

The cases cited by Mr. Osler do not, I think, assist the defendant, and I cannot find any ground upon which I am able to examine the evidence.

I am compelled to come to the conclusion that the appeal must be dismissed, and with costs.

CAMERON, C. J., and GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

CLENDINNING V. TURNER.

Wharf—Use and occupation—Tolls—Obstruction of navigable waters.

D., by permission of the Commissioners of Crown Lands for Ontario, built a wharf on the waters of Toronto Bay at the island near Hanlan's Point; and claimed a sum of money from C. for the use and occupation by him of the wharf in landing passengers from his steamer.

Held, that there could be no recovery; for the evidence failed to shew any agreement by C. to pay wharfage, &c., or that tolls had been usually collected or charged, while the relationship and dealing of the parties would raise the inference that no charge was contemplated.

Held, also, that the wharf being constructed over the navigable waters of the bay, the license of the commissioner, even if he had power to grant it, would not confer the right to impose tolls on vessels landing passengers on the wharf, for the public had a right to reach the shore over the waters of the bay, and C. having been invited, as it appeared, by the proprietors of Hanlan's point to run his vessel there he had a right to land on the wharf which prevented his reaching the island at that place.

Quære, whether the soil at the bottom of the Toronto Bay at the place in question was vested in the province, or in the city of Toronto under the patent from the Crown of the island.

THE plaintiff's claim was for money due on an account stated, and on other claims.

The defendant counter-claimed for the use and occupation by the plaintiff with his steamer *Canadian* of a wharf built by the defendant on the waters of the Toronto Bay or harbour at the island, near Hanlan's Point, to land passengers at the island; for advertizing on the plaintiff's and defendant's joint account; and for damages caused by the neglect and unskilful management of the plaintiff's steamer whereby it ran against the wharf, breaking the timbers and spiles, &c.

The cause was tried before Rose, J., without a jury, at Toronto at the Winter Assizes of 1884.

The learned Judge directed judgment to be entered for the plaintiff for \$360; and for the defendant in respect of his counter-claim for \$160, of which \$100 was allowed for the use of the wharf; \$50 for the advertising on the joint account; and \$10 for the injury to the wharf caused by the unskilful management of the plaintiff's steamboat *Canadian*.

During Hilary sittings, *Allan Cassels*, moved on notice to set aside the judgment for the defendant on his counter-claim, and to enter judgment for the plaintiff.

During the same sittings, *Allan Cassels*, supported the motion. There was no use and occupation by the plaintiff of the wharf. It must be shewn that the plaintiff occupied under the defendant or with his permission, either express or implied. The action for use and occupation is one of contract, and is founded on the relationship of landlord and tenant; and it therefore requires evidence of an occupation by the permission of and under a contract with the plaintiff. No agreement was proved here, and no relationship existed from which a contract would be inferred: *B. & L. Prec.*, 4th ed., p. 234; *Roscoe's N. P. Ev.*, 15th ed., pp. 303-4; *Cunningham and Mattinson*, p. 629; *Cobb v. Carpenter*, 2 Camp. 13, note; *McDonald v. Brennan*, 5 U. C. R. 599; *Slooper v. Saunders*, 29 L. J. N. S. Ex 275; *Thompson v. Bennett*, 17 C. P. 380, 385; R. S. O. ch. 23. No title was shewn in the defendant. The defendant merely shews a parol license from the Commissioner of Crown Lands, whereas there should have been an Order in Council. The Province also has no right to these water lots. They are part of the Toronto harbour. In *Hood v. Toronto Harbour Commissioners*, 34 U. C. R. 87, the Court seemed to think that there were no defined limits of the Toronto harbour. But the limits were defined by 4 Wm. IV. ch. 23, sec. 13. This was repealed by 12 Vic. ch. 80, but was, as to said limits, re-enacted by 12 Vic. ch. 81, sec. 82, and the limits therefore are the same as those of 4 Wm. IV., and would include the *locus in quo*. See also C. S. U. C. ch. 54, secs. 1, and 425; R. S. O. ch. 174, secs. 3 and 596; Mun. Act 1883, secs. 3 and 606. The harbours are vested in the Dominion by the B. N. A. Act: *Holman v. Green*, 6 S. C. R. 707. This being a water lot fronting on the island the right thereto might also be claimed by the corporation of the city of Toronto under the patent to the city of Toronto of the island; at all events the citizens have free access to the shore of the

island over the waters of the bay. It also may be vested in the Dominion under the reservation of fishing rights around the island. There can be no obstruction of the navigable waters so as to interfere with the rights of the public: *Attorney-General v. Perry*, 15 C. P. 329, 331; *Coulson & Forbes on Waters*, p. 396; *Dixson v. Snetzinger*, 23 C. P. 235, 250; *Blundell v. Catteral*, 5 B. & Al. 268; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Wood v. Esson*, 9 S. C. R. 239; *Attorney-General v. Terry*, L. R. 9 Ch. 423. The plaintiff was also invited by the proprietors of Hanlan's Point to use that part of the island and was, therefore, entitled to pass over the wharf to reach the shore. The case of *Marshall v. Ulleswater Steam Navigation Co.*, L. R. 7 Q. B. 166, shews clearly that as the defendant's wharf obstructed the plaintiff's free access to and from the island he had the right in passing to and from the island to use the defendant's wharf, which obstructed such access.

W. Laidlaw, contra. The relative rights of the Dominion and Provincial authorities do not arise here and need not therefore be discussed. The case turns on acquiescence and an implied right to charge a reasonable amount for use and occupation. The wharf was built in the presence of all the parties and no objection was raised to the defendant doing so, and the plaintiff ran his vessel to the wharf under arrangements made between the parties, and the plaintiff cannot now question defendant's right to recover. The owner of a wharf or a quay is entitled at common law to remuneration for the use of them. Wharfage is due for landing on the wharf, as was done here: *Coulson & Forbes on Waters*, p. 565; *Lancaster v. Eve*, 5 C. B. N. S. 717. The defendant is clearly entitled to charge for the advertising; and for the damage done to the wharf through the plaintiff's negligence and want of skill in the management of his vessel.

February 28, 1885. CAMERON, C.J.—The defendant built the wharf in question by the permission of the Hon. T. B. Pardee, Commissioner of Crown lands for the Province of

Ontario, the Province, as I understand, claiming the soil under the waters of the bay, and the right to grant water lots.

The corporation of the city of Toronto, under grant to it made by the Crown, on the 26th day of June, 1867, before Ontario became a separate Province, of that portion of the Island west of what is known as the gap, with the exception of ten acres reserved for the purpose of the light house, claims the water lots in front, or at all events free access to the shore and from it by the waters of the bay.

There was no agreement on the part of the plaintiff to pay wharfage, or for the use of the wharf, nor did it appear that tolls had been usually collected or charged.

In the view I take of the evidence, it will not be necessary to determine whether the soil at the bottom of the bay on which the wharf in question was erected, is vested in the Government of the Province of Ontario or in the Corporation of the city of Toronto, by virtue of the patent or grant to the city from the then Government of the Province of Canada, as I do not think, considering the relationship and dealing between the parties as to the wharf, and their separate business, it was in the contemplation of either that wharfage or dues should be paid by the plaintiff to the defendant.

The arrangement established by the evidence to have been made by them expressly provided that each was to bear a part of the cost of printing, in which they were both interested, and of the building of the office on the wharf where tickets for the boats were sold; and it is improbable that if the defendant contemplated charging wharfage that something would not have been said about it.

I am also of opinion the wharf was constructed over the navigable waters of the bay, and the verbal license from the Commissioner of Crown Lands, assuming the Commissioner had power to grant such license, did not give the right to impose a toll upon vessels landing passengers upon it. The public had a right to reach the shore of the

island over the waters of the bay, and the plaintiff, being invited by Hanlan or his tenant, the lessee of the corporation of the land on the island extending to the waters edge, to run his boat to that point, he had the right to land upon the wharf, which prevented his reaching the shore there.

The case is very like in its circumstances, in some respects, that of *Marshall v. Ulleswater Navigation Co.*, L. R. 7 Q. B. 166, 172, cited by Mr. Cassels on the argument.

The general rule of law is, that an obstruction in the public highway may be removed by any of the public having occasion to use the way, or the obstruction itself may be used as a means of making the highway available, provided that in such use no unnecessary damage is done to that which causes the obstruction if it be of any value, and can, without unreasonable trouble, be moved out of the way.

The defendant's claim, therefore, to the extent of \$100, should be disallowed.

But as the learned Judge has found that the wharf was damaged by the negligence and want of care of the plaintiff in the management of his boat, the defendant has a right to retain the finding in respect of that sum which rests upon a different footing from the claim for wharfage.

No one is at liberty either negligently or wilfully to exercise his rights so as to injure another, and as it was possible for the plaintiff, and reasonable that he should so have managed his boat as not to do an injury to the wharf, and as the injury was not done in the reasonable exercise of his right to remove the obstruction out of his way, but negligently while availing himself of the beneficial use of the wharf, it is both legal and just that he should compensate the defendant for it.

The plaintiff is also liable for his proportion of the printing which the learned Judge has placed at the reasonable sum of \$50.

The judgment will therefore be modified by reducing the defendants claim in respect of his counter-claim to \$60.

The plaintiff will also be entitled to the costs of this motion, in addition to the general costs of the cause.

GALT and ROSE, JJ., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

IN RE DE SOUSA.

English barrister—Right to practise in Ontario—Admission through Law Society.

Held, that to entitle an English barrister to practise at the bar of Her Majesty's Courts in Ontario, he must be admitted to practise through the Law Society of the Province.

THIS was an application on behalf of a gentleman who had been called to the English Bar, but who had not been admitted as a member of the Law Society, to be admitted to practise at the bar in this Province; and who claimed, this as a right irrespective of the rules and regulations of the Society.

During Hilary Sittings, February 14th, 1885, the applicant in person supported the motion.

C. Robinson, Q. C., and Walter Read, contra.

The arguments sufficiently appear from the judgment.

February 28, 1885. GALT, J.—Until a little over fifty years ago the appointment of Attorney-General was made in England, the last appointment so made being that of the late Mr. Jameson, who subsequently was the first Vice-Chancellor when the Court of Chancery was established

in this Province. That gentleman before he was called to the bar and admitted to practise in Upper Canada became a member of the Society in Trinity Term, 1833, and was called to the bar the same term, and then afterwards filled the office of Attorney-General.

The law bearing on this subject is very brief. In 1794 the Parliament of Upper Canada passed an Act (34 Geo. III. ch. 2) "To establish a Superior Court of Civil and Criminal Jurisdiction and to regulate the Court of Appeal."

It should be borne in mind that the Legislature of Upper Canada at their first meeting in 1792 had passed an Act (32 Geo. III. ch. 1) declaring that from and after the passing of that Act "In all matters of controversy relative to property and civil rights, resort should be had to the laws of England."

Three years after the Court of King's Bench was established, in 1797, an Act was passed (37 Geo. III. ch. 13) "for the better regulating the practice of the law."

By the first section it was enacted that from and after the passing of the Act the then practitioners might "form themselves into a Society, to be called the Law Society of Upper Canada, as well for the establishing of order amongst themselves, as for the purpose of securing to the Province and the profession a learned and honourable body," &c. The above section embraced all the then practitioners.

By the 5th section it was enacted: "That no person other than the present practitioners, shall be permitted to practise at the bar of any of His Majesty's Courts in this Province" (except under certain conditions which do not apply to this case), "provided always, that it shall and may be lawful for any person having been duly admitted to practise at the bar of any of His Majesty's Court's in Scotland, England, or Ireland, or any of His Majesty's Provinces in North America, on producing sufficient evidence thereof, and also on producing testimonials of good character and conduct to the satisfaction of the Judges of the King's Bench, to be admitted to practise in this Province, so as such person shall within one month from such admission, enter himself

of the said Society, and conform to all the rules and regulations thereof."

This section has since been altered; but I call attention to it now as shewing that the mere fact of a gentleman having been duly admitted to practise at the bar in England was not in itself sufficient to entitle him, as a matter of right, to be admitted to practise in this Province, but he was obliged to produce testimonials of good character and conduct to the satisfaction of the Judges, and in addition was bound to become a member of the Law Society, and become subject to all the rules and regulations thereof. He was then entitled to be admitted to practise by the Judges, and not by the Law Society.

The law remained in this state for nearly a generation, when in 1822 an Act was passed (2 Geo. IV. ch. 5), incorporating the Law Society; and section 2 repealed the above provision and enacted: "That from and after the passing of this Act, it shall and may be lawful for any person having been duly called to practise at the bar of any of His Majesty's Superior Courts, not having merely local jurisdiction in England, Scotland or Ireland, or in any of His Majesty's Provinces in North America, in which the same privilege would be extended to barristers from this Province, on producing sufficient evidence thereof, and also on producing testimonials of good character and conduct, to the satisfaction of the Law Society of this Province, to be called by the said Law Society to the degree of a barrister, upon his entering himself of the said Society, and conforming to all the rules and regulations thereof."

The object and effect of this enactment was to transfer the power previously exercised by the Judges to the Law Society. It is plain from the words of the repealed section that the powers of the Judges was "to admit to practise," consequently the same meaning must be given to the words "to be called by the said Law Society to the degree of a barrister."

It is manifest that the status of a gentleman as an English barrister in itself did not under either of these statutes entitle him as a matter of right to be admitted to practise at the bar in this Province. Under the former he was bound to satisfy the Judges of his personal as distinguished from his professional standing; and under the latter this duty was cast upon the Society, the only difference being, that under the first statute he must become a member of the Law Society, after his admission, while in the latter it was essential that he should become a member of the Society before he was admitted. The statutes were subsequently consolidated in 1859.

By ch. 33 of the Consol. Stat. U. C. sec. 1, the Law Society was continued as then constituted, "and the Benchers thereof shall have the power heretofore exercised to call and admit to the practise of the law, as a barrister, any person duly qualified to be so admitted according to the provisions of law and the rules of the Society."

Nothing is said as to the class of persons to be so admitted. It is a general authority as "heretofore exercised to call and admit to the practise of the law as a barrister," &c.

We then come to ch. 34. This statute is prohibitory as respects all persons except those therein mentioned. The words are: "The following persons, and no others, may be admitted to practise at the bar." It is not that they shall be, but that they may be. Among these: "Any person who has been duly called to the bar of any of Her Majesty's Superior Courts in England." This qualifies a person for admission to practise, but does not entitle him as a matter of right to demand such admission. It must be read in connection with the provisions of the preceding chapter; and all he can claim under it is, that he is duly qualified to be called and admitted "according to the provisions of law;" but he must go further and comply "with the rules of the Society."

By sec. 37 of R. S. O. ch. 138, "The Benchers shall have the power heretofore exercised to call and admit to the

practise of the law as a barrister any person duly qualified to be so admitted, according to the provisions of law and the rules of the Society." This section is the same as sec. 1 of ch. 33 C. S. U. C., above referred to.

The last Act to be considered is ch. 139 of R. S. O. This differs essentially from ch. 34 of C. S. U. C. The words of the 3rd sub-section are the same, but it is expressly enacted "that the persons who may be admitted to practise at the bar in Her Majesty's Courts of Law and Equity" are entitled to be so admitted, "subject to any rules, regulations, or by-laws made by the Benchers of the Law Society."

It is manifest that to give effect to the contention of the present applicant would be entirely to ignore the 37th sec. of ch. 138, and of the above section, as his demand is, that he should be received as a member of the bar by this Court, irrespective of the Law Society, or of their rules and regulations, simply because he is a member of the English bar.

This application must be refused.

CAMERON, C. J.—The motion of the learned applicant raises the question: Is a member of the English bar entitled to practise in Her Majesty's Courts of Law and Equity in this Province without coming through, as it were, the portals of the Law Society, which heretofore had been recognized as the only means of approach to the Courts to obtain audience in the character of counsel for litigants.

The applicant claims the right absolutely, as I understood his argument, as an undeniable statutory right given to him, having the status of an English barrister, under sec. 1, sub.-sec. 3 of R. S. O. ch. 139, which he reads as unconditionally giving to members of the English, Scotch, and Irish Bars the right to practise in this country.

The language alleged to have that effect is as follows: "Subject to any rules, regulations, or by-laws made by the Benchers of the Law Society of Upper Canada, * * the following persons, and no others, may be admitted to practise at the Bar in Her Majesty's Courts of Law and Equity in

Ontario." (3.) Any person who has been duly called to the bar of any of Her Majesty's Superior Courts in England, Scotland, or Ireland, not being Courts of merely local jurisdiction."

The applicant contends in effect that without the provision, "subject to any rules, regulations or by-laws made by the Benchers of the Law Society," the Courts would be absolutely prohibited from admitting any to practise before them except those expressly indicated in sub-sections one to five of the said 139th chapter; and the object and aim of the reference to the Law Society, was to add another class to those specially mentioned; that is to say, any person to whom the Law Society, under rules and regulations, made under sec. 38 of R. S. O. ch. 138, might award the privilege.

The language of the clause is certainly capable of receiving a sensible interpretation by this construction. But it is also open to another and different construction, that is to say, subject to the rules and regulations of the Law Society made in reference thereto, the different classes of persons indicated in the sub-sections might be admitted to practise; and in giving the clause a judicial construction regard must be had to what was the intention of the Legislature, as evidenced by the enactment itself considered in reference to the law at the time.

It will therefore be necessary to make a brief retrospect as to the position of persons of the status of the applicant previous to the consolidation of the law as established in R. S. O. ch. 139.

The first enactment on the subject is to be found in sec. 5 of 37 Geo. III. ch. 13. Under this any person duly admitted to practise at the bar in England, Ireland, or Scotland might be admitted, under certain conditions as to good character and conduct, by the Judges of the then King's Bench, so as such person should, within one month of admission, enter himself of the Law Society, established for the first time by that Act, and conform to all the rules and regulations thereof.

This provision was, by sec. 2 of 2 Geo. IV. ch. 5 repealed, and the following enactment made: "From and after the passing of this Act, it shall and may be lawful for any person having been duly called to practise at the bar of any of His Majesty's Superior Courts, not having merely local jurisdiction in England, Scotland, or Ireland, or any of His Majesty's Provinces in North America, in which the same privilege would be extended to barristers from this Province, on producing sufficient evidence thereof, and also on producing testimonials of good character and conduct, to the satisfaction of the Law Society of this Province, to be called by the said Law Society to the degree of barrister, upon his entering himself of the said Society, and conforming to all the rules and regulations thereof."

This enactment remained in this respect unchanged till the consolidation of the laws under the authority of the Act, 22 Vic. ch. 30, when the law relating to barristers appeared in a distinct Act from that relating to the Law Society, viz., ch. 34 of Consol. Stat. U. C., wherein it was enacted by sec. 1 "That the following persons, and no others may be admitted to practise at the Bar in Her Majesty's Courts of Law and Equity in Upper Canada;" and in sec. 3 the right was accorded to persons of the status of the applicant in the same words as are found in sub-sec. 3 to sec. 1 of R. S. O. ch. 139,

The Acts relating to the Law Society were consolidated by ch. 33 of the said Consol. Stat. U. C.

By the first section of this Act it is enacted that "The Law Society of Upper Canada and the Benchers thereof shall have the power heretofore exercised to call and admit to the practise of the law, as a barrister, any person duly qualified to be so admitted, according to the provisions of law and the rules of the Society;" and by sec. 5, "The Benchers of the Society" are given power from time to time to "make rules for the government of the Society, and other purposes connected therewith, under the inspection of the visitors."

Up to the present application I think it has never been doubted that the power to admit to practise at the bar or to call thereto was vested in the Law Society. Certainly there is nothing in the Consol. Stat. U. C. ch. 34, that denies the right or takes it away, nor is there anything in the Acts, R. S. O. ch. 139 or 138, that can be construed as having that effect. For, in the latter, sec. 37 expressly declares "The Benchers shall have the power heretofore exercised to call and admit to the practice of the law as a barrister any person duly qualified to be so admitted, according to the provisions of law, and the rules of the Society."

It is to be observed in sec. 1 of Con. Stat. U. C. ch. 34, and sec. 1 of R. S. O. ch. 139, the provision is not that the person qualified may be admitted to practise *by*, but *in* the Courts, indicating, I think pretty clearly, that the framers of the Act recognized that the admitting power rested somewhere else than in the Courts, in other words, in the Law Society.

I am, therefore, of opinion that the applicant can only be admitted through the doors of the Law Society to practise at the bar of the Courts of this Province; and that the Courts have no jurisdiction to recognize the right of any one so to practise unless such right shall be certified to the Court by the Law Society.

In coming to this conclusion I have not overlooked the applicant's reference to the difference in the language used in sub-sections 1, 2, and 4 of said first section of R. S. O. ch. 139, wherein the persons thereby entitled to admission to practise are expressly required to conform to the rules of the Society, while that requirement is not contained in sub-sec. 3, under which the applicant comes; but the right to make rules with regard thereto, I think, is clearly vested in the Society by the legislative power given to it, the omission is unimportant and has arisen from dividing up the provisions contained in sec. 2 of 2 Geo. IV. into paragraphs; and there are, I believe, rules of the Law Society relating to the subject.

The applicant must therefore go to the Law Society to

obtain the right to practise his profession in this Province ; and if that right is unreasonably or oppressively denied to him, it may be that the Court, while not having the power to admit directly, may have jurisdiction to aid him on a proper case made out in the enforcement of his right.

This observation is not made from the slightest doubt that the Benchers of the Society will be found disposed in any manner to deny to or unreasonably retard the applicant from the enjoyment of the right he claims on his seeking it, as he must, through the Society itself in the first instance.

It is just possible the repeal of some of the rules of the Society, which were produced on the argument, may cause some difficulty, but I think there is no good reason to think that may not readily be got rid of.

ROSE, J.—It is clear that the power to admit persons to practise at the bar was taken from the Courts and given to the Law Society of Upper Canada.

Sec. 6 of R. S. O. ch. 139, refers to the bar as “in Her Majesty’s Courts of Law and Equity in Ontario.” Sec. 37 of R. S. O. ch. 138 empowers the Benchers “to call and admit to the practise of the law as a barrister.”

I cannot accede to the argument that the power of the Law Society is merely to call to the bar, *i.e.*, of the Society, and the power of the Courts is to admit to practise at the bar in the Courts.

The language of the sections referred to prevents such a contention being successfully urged.

I am, therefore, of opinion that the power to admit to the practise of law at the bar in Her Majesty’s Courts of Law and Equity in Ontario rests not in the Courts but in the Law Society ; and that Mr. De Souza, not having been admitted by the Law Society, we cannot hear him at the bar in this Court.

Application refused.

[COMMON PLEAS DIVISION.]

BROWN v. HOWLAND.

Promissory note—Officer of company—Liability—Perfected note—Extrinsic evidence—Per, meaning of—Election—40 Vic. ch. 43, sec. 79, D.

Action against the defendant as the maker of a promissory note. Before the defendant's signature was, as alleged, the word *per*, and underneath was the name "William Stockdale, manager." The alleged note was given in renewal of a note made by the Toronto Patent Wheel and Waggon Company, limited, and was brought to the defendant by plaintiff for the purpose of having it executed by the company, when defendant, who was the secretary of the company, signed it, the intention being that the company's name should be filled in over defendant's by the company's manager, by stamping it with defendant's stamp, but which was not done. After the note became due, the plaintiff proved on it against the company who had gone into insolvency, and obtained a dividend.

Held, that the defendant was not liable.

Per CAMERON, C. J.—The defendant must be treated as maker of the note, extrinsic evidence not being admissible to change its legal effect: that the word *per* as written, would not assist defendant, for it might be treated as merely a flourish to the initial letter to defendant's name; but, even if assumed to be *per*, i. e., by, it would merely signify that the name Wm. Stockdale was written by defendant, which the evidence shewed was not the case; but that the plaintiff by proving against the company on the note and accepting a dividend thereon, had elected to look to the company, and thereby absolved the defendant.

Per OSLER, J. A.—The defendant could not be treated as maker of a note, for the evidence shewed that the instrument never was perfected as a note; and that this was no infringement of the rule as to the admission of parol evidence, for its effect was not to alter a note but to shew that the condition upon which it was to become a note had not been performed.

Held, that the provisions of sec. 79 of 40 Vic. ch. 43, D., did not apply to this note, as it did not purport to be a note signed by or on behalf of the company.

STATEMENT OF CLAIM.

THE defendant is president of the Toronto Patent Wheel and Waggon Company (limited), a joint stock company duly incorporated, and carrying on business at the city of Toronto.

The company being indebted to the plaintiff, the defendant and one William Stockdale gave to the plaintiff, on account of such indebtedness, on or about the 15th day of March, 1883, their promissory note in the words and figures following:

"\$831.85.

"Due May 18th, 1883.

No. 1991.

Toronto, March 15th, 1883.

"Two months after date, we promise to pay to the order of William Brown at the Dominion Bank here, the sum of eight hundred and thirty-one 85-100 dollars, value received.

"Per O. A. HOWLAND,

"WILLIAM STOCKDALE, Manager."

The defendant, an officer of the company, signed on its behalf the said note and the name of the company with the word "Limited," after it, was not, and is not thereupon, or mentioned therein, as required by The Canada Joint Stock Companies' Act, 1877, under which the said company is incorporated, and the note has not been duly paid by the company, but still remains unpaid and unsatisfied, by reason whereof the defendant became, and was, and still is, personally liable to the plaintiff, the holder of the note for the amount thereof.

3. The note became due on the 18th day of May, 1883, but has not been paid.

STATEMENT OF DEFENCE.

The defendant did not make the note sued on.

The defendant is not and never was president of the Toronto Patent Wheel and Waggon Company (Limited.)

The alleged note sued on, is not correctly set forth in the statement of claim, but is in the words and figures following, that is to say, setting out the note with the words "Toronto Patent Wheel and Waggon Co." above the defendant's name; and alleged that the words "Toronto Patent Wheel and Waggon Company" were in pencil and in the hand-writing of the plaintiff or his agent, being the same handwriting as the body of the note.

The defendant was at the time of the alleged making and giving of the note sued on secretary of the company, which was duly incorporated under the Canada Joint Stock Companies' Act, 1877, and William Stockdale was the manager and cashier thereof, and the said alleged note was given as a renewal of a previous note given by the company to the plaintiff, it having been agreed on the

maturity thereof, that the renewal note of the company should be received in lieu thereof, a statement and memorandum of the agreement being drawn up by the plaintiff, showing the amount of the company's indebtedness to the plaintiff at the time, namely, the amount of said note, and such statement and memorandum was delivered by the plaintiff or his agent to the defendant; and the alleged note sued on was also drawn up by the plaintiff and tendered by the plaintiff to the defendant for execution by the company pursuant to the said agreement, and was accepted by the plaintiff from company's manager in the form now sued on as the renewal note of the company; and the words "Toronto Patent Wheel and Waggon Company" being written thereon by the plaintiff or his agent for the purpose of making plain that the alleged note was the note of the company.

The company is in liquidation pursuant to the provisions of the 40 Vic. ch. 43, D., and is being wound up under the said Act, and the plaintiff duly filed a claim against the company with the liquidator upon the alleged note as a note of the company, which was allowed by the liquidator, and a dividend declared thereon, which was paid to the plaintiff and accepted by him.

The plaintiff never made any claim against the defendant upon, or in respect of, the alleged promissory note until a short time before this action was brought, and until long after the alleged note had fallen due, and after the company had commenced to be wound up, and after the plaintiff had filed his claim upon the alleged note with the liquidator of the company as a promissory note of the company.

The alleged note sued on was signed by the defendant as secretary of the "Toronto Patent Wheel and Waggon Company," and was so signed in general accordance with the powers of the defendant, as such secretary, but was not delivered by the defendant or by his agent.

The alleged note sued on, when signed by the defendant, had not the words "The Toronto Patent

Wheel and Waggon Company" thereon. It was the duty of William Stockdale, the manager and cashier of the company, to sign the promissory notes of the company, as manager thereof, and to sign thereon the name of the company, namely, the words "The Toronto Patent Wheel and Waggon Company (limited)," with a printing stamp bearing these words, which stamp was kept in the custody of the manager at the head office of the company for that purpose, and to deliver such notes when countersigned by the secretary of the company to the payee; and the plaintiff was aware that such was the custom of the company. The alleged note was only signed by the defendant as secretary, with the intention that the same should be duly completed by the manager, with the company's name and signature as manager, and was given to the manager for the purpose of being countersigned by him, and to have the name of the company, with the word "Limited" thereafter, signed or impressed thereon; but the note was delivered to the plaintiff by the manager by mistake and inadvertence, and was accepted by the plaintiff by mistake and inadvertence, without the words "The Toronto Patent Wheel and Waggon Company (limited)," being impressed or signed thereon by the manager, but without the knowledge of the defendant that such name had not been so signed or impressed.

There never was any good or valuable consideration paid or given to the defendant for or in respect of the alleged note, or for making the same.

The defendant did not deliver to the plaintiff, or his agent, or any person through whom he claims the alleged promissory note sued on.

If this Court shall be of opinion that the defendant was at any time personally liable to pay the alleged note, then the defendant claims that the plaintiff waived the liability of the defendant and accepted the liability of the said company in lieu of that of the defendant.

The defendant claims by way of counter-claim that the plaintiff may be enjoined from continuing this action, or any other proceedings against the defendant, upon alleged note, and for treating the alleged note as a liability of the defendant.

The cause was tried before Galt, J., without a jury, at Toronto, at the Winter Assizes of 1885.

The evidence so far as material, is set out in the judgment.

The learned Judge at the trial delivered the following judgment:

GALT, J.—I dismiss the action with costs on the ground that at the time when the plaintiff received the note from Mr. Howland he did so knowing it to be imperfect; knowing that Mr. Howland was signing in a representative capacity only, and that the note was to be taken to the manager of the company to be countersigned by him and to be recognized as a note of the company; and upon the face of the note itself it is manifest that Mr. Howland never incurred nor intended to incur any personal responsibility respecting the note.

As regards the argument of Mr. McLaren based on the statute, I am of opinion that it has no application to this case for two reasons: first, the name of the company does not appear on the note at all; and secondly, the plaintiff himself was the party who had the note in his possession, who knew at the time that it was intended to be a note of the company, and it was his own fault if the note was not completed as it was the intention of Mr. Howland at the time he signed it that it should be completed.

I therefore dismiss the action, with costs.

In Hilary sittings *McLaren* moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

During the same sittings, February 13, 1885, *McLaren* supported the motion. The defendant is personally liable for having signed the note as agent without putting his principal's name to it. It has been held that when an officer of a corporation signs a note on behalf of a cor-

poration, for even though the name of the corporation is used it is only a matter of description, the corporation is not liable, but the officer signing it is personally liable: *Madden v. Cox*, 5 A. R. 473; *Hagarty v. Squier*, 42 U. C. R. 165. Here, however, the name of the corporation does not appear at all. The authorities clearly shew that where an agent signs a note, but the name of the corporation does not appear the agent is personally liable, and even though he describes himself as agent: *Story on Agency*, 9th ed., p. 187, sec. 155; *Leake on Contracts*, p. 500; *Parsons on Notes and Bills*, 2nd ed., vol. i., pp. 95, 102; *Daniel on Negotiable Instruments*, 3rd ed., sec. 305; *Leadbitter v. Farrow*, 5 M. & S. 345. The next point is, that even admitting that the note was signed by the defendant on behalf of the Toronto Patent Wheel and Waggon company (limited), it was signed without the name of the company with the word "limited" written after it, and so under sec. 79 of the Joint Stock Companies Act, 40 Vic. ch. 43, D., under which the company was incorporated, the defendant was liable to the plaintiff as the holder of the note as the company did not pay it.

F. Arnoldi, contra. This never was a note at all. The evidence shews that the plaintiff took the note, which was a renewal of a previous note given by the company to the defendant, who was the secretary of the company, to get it signed by the company, and the defendant put his name to it, with the word *per* before it, the intention of the parties being that the name of the company should be added by stamping it on the note, with the company's stamp, and that until the name of the company was so stamped on it it was not to be deemed to be a perfected note, and it was given by the defendant to the plaintiff for the purpose of being perfected by the addition of the company's name. The plaintiff could himself have filled in the note and sued the company. The defendant must be assumed to have signed the note officially so as to bind the corporation: *Parsons on Notes and Bills*, 2nd ed., vol. i., p. 169. The Court should reform the note by adding the name of the

company and so carry out the intention of the parties : *Druiff v. Lord Parker*, L. R. 5 Eq. 131 ; B. & L. Prec., 2nd ed., 485, 487 note ; *Wake v. Harrop*, 6 H. & N. 768, 1 H. & C. 202 ; *Laing v. Taylor* 26 C. P. 416. The plaintiff, however, proved on the note against the company, and thereby elected to hold the company on it, and he cannot afterwards sue the defendant. Then as to the second point. This is a penal statute and must be construed strictly. The plaintiff should have shewn that the company signed a promissory note without the addition of the word "limited." The evidence merely shews that defendant signed a piece of paper which under certain circumstances might become a note. The statute also only applies when a note is purported to be signed by the company. Here the company's name does not appear at all.

McLaren, in reply. There can be no reformation of the note. The cases of *Druiff v. Lord Parker*, L. R. 5 Eq. 131 ; *Wake v. Harrop*, 6 H. & N. 768, 1 H. & C. 202, and that class of cases do not apply. In all those cases the name of the company appeared on the face of the instrument, and there was something which raised an implication that the company was to be liable and justified the admission of parol evidence to show the true contract. If it were otherwise it would amount to the admission of parol evidence to vary the note which is clearly inadmissible. This was clearly a promissory note. It in every respect complies with all the requisites of a note.

February 28, 1885. CAMERON, C. J.—Looking at the promissory note sued on, without extraneous evidence of the circumstances under which the defendant signed it, he would undoubtedly appear to be liable thereon. The extraneous circumstances set up by the defendant in his statement of defence, and by the evidence, present two questions which the defendant contends must be answered in his favour, and which, if so answered, furnish a defence in law to the plaintiff's claim.

The first is, that the note was signed by him in his

capacity of secretary of the Toronto Wheel and Waggon Company, Limited, merely for the purpose of authenticating it as the promissory note of the said company, and was delivered by him to the plaintiff or his agent for the purpose of having the name of the company stamped thereon, and signed by the manager of the company; and that the said note was delivered by the said manager to the plaintiff by mistake and inadvertence, and was accepted by the plaintiff by mistake and inadvertence without the words "The Toronto Patent Wheel and Waggon Company, Limited," being impressed or signed by the said manager, but without the knowledge of the defendant that such name had not been so signed or impressed; and there was no good or valuable consideration paid or given to the defendant for or in respect of the said alleged note, or for making the same.

And secondly, the plaintiff, with knowledge of all the facts, proved in respect of the said note against the insolvent estate of the said Toronto Patent Wheel and Waggon Company, and received from the said estate a dividend in respect of the said claim, and thereby elected to accept the said company, the plaintiff's original debtor, as their debtor instead of the defendant who was only an agent of the company.

There is no doubt upon the evidence that the said company was the debtor of the plaintiff, and that there was no other consideration than the debt of the company for the giving of the said note.

The plaintiff admitted when he applied to the defendant for the note it was to him as secretary of the company, and he expected to get the company's note, and not the individual note of the defendant; but not being able to realize the amount of the note from the company, he claims now, if the law allows him, to recover from the defendant on the note.

The defendant's account of the way he came to sign the note, is as follows: "The practice was, if the notes were made at the company's office, the manager should affix the

stamp and bring down the note signed by himself, and then it was countersigned by myself, and he took charge of it. In any case where it happened, as in this case, that the note was brought to my office, then it was my practice to send it to the manager for completion in the same way. It was always the intention that the notes should have these words: "Toronto Patent Wheel and Waggon Company." If it was omitted, it was purely accidental. * * I don't wish to swear positively as to the delivery of the note. There were a great many transactions, and I can only say that I never was the bearer of notes or the deliverer of notes. I speak of the practice of the company, and I think this has been delivered in the usual way by Stockdale. I have no remembrance to the contrary. * * The note was brought to me either by the plaintiff or his book-keeper. I think it is very possible that I sent it by the messenger who brought it to the manager at the works, but I am not able to swear definitely to what took place."

The plaintiff in his examination put in evidence by the defendant, said: "I produce the note sued on. I took this in respect of the liability of the Toronto Patent Wheel and Waggon Company under certain considerations. It was the liability of that company that this note covered. I got that note for the liability of the company. I do not know what Mr. Howland intended it for. This was to take up two notes of the Toronto Patent Wheel and Waggon Company. When I got this note it was the note of the Toronto Patent Wheel and Waggon Company that I was to get. This was in renewal of other notes that I held from the Toronto Patent Wheel and Waggon Company."

On these facts it would seem clear, if extrinsic evidence was admissible to shew the intention of the parties, neither the plaintiff nor the defendant supposed the latter was making himself personally liable.

But it would seem equally clear upon authority that the intention of the parties must be gathered from the note itself, and extrinsic evidence, not disclosing fraud, is inad-

missible to change the character or purpose of the signature as it appears upon the note.

I am not able to distinguish this case on the facts on principle from *Hagarty v. Squier*, 42 U. C. R. 165.

In that case the inspector of an insurance company drew a draft upon his company for the amount of a loss under a policy of the company in favour of the policy-holder, and was sued thereon. It was found as a fact at the trial that the plaintiff did not suppose that the defendant would be, nor did the defendant intend to make himself, liable: that the actual bargain was, that the plaintiff should get a bill upon which the company would be, but there was no express agreement or understanding that the defendant should not be liable. In giving judgment, the then Chief Justice of the Queen's Bench stated the law thus: "Where there is nothing but a misapprehension or misunderstanding as to the legal effect of an instrument signed by a defendant, and no fraud is shewn in the obtaining of it, there does not appear to be any right in equity to resist its legal operation," citing in support of this proposition *Powell v. Smith*, L. R. 14 Eq. 85, 90; *Campbell v. Edwards*, 24 Gr. 152; adding: "The rule is accurately expressed by Mr. Justice Gwynne, in *Laing v. Taylor*, 26 C. P. 416, where he says, at page 429: 'Equity does not interfere to relieve a party from the obligation of a contract which he has voluntarily entered into, under a misunderstanding or misapprehension of the legal effect of the contract, it may be, but where such misunderstanding or misapprehension was not induced by any fraud of the other party, and where the contract as drawn is not a violation of an agreement existing between the parties.'" The learned Chief Justice then added: "This statement of the law shows that the defendant in this case is, upon the facts, without defence both at law and in equity."

Unless there is some established legal distinction between a promissory note and bill of exchange, the present case and *Hagarty v. Squier* are not distinguishable upon principle. I see no room for a distinction where the party

to the bill is drawer or endorser. These parties would seem to be in no better or worse position than the maker of a note, and the same rule of responsibility should attach.

On the facts there is no pretence for saying that any fraud has been practised by the plaintiff. Admitting that he or his book-keeper took the note from the defendant to Stockdale, the manager of the company, to complete, there is nothing to shew, if that would have made any difference, that there were any instructions given to the messenger to have it completed in any particular way; and the case, on the evidence, it seems to me is the same as if the plaintiff had written to the defendant for a note in renewal of the company's notes then due or falling due, and the defendant or Stockdale had sent the note sued on in its present shape in response to the request.

The use of the word "per" before the signature does not, I think, make the case stronger in favour of the defendant. Looking at it as it is written upon the note, it might be taken for nothing more than a flourish before the initial O. of the defendant's name with which it is connected. But assuming it to be "per," and that per means *by*, it would at most signify that the name William Stockdale, manager, was written by the defendant, which the evidence shews was not the fact. I am therefore of opinion, contrary to my own view of what in the absence of authority the law should be on the facts, that the defendant must be held in law to be a maker of the note sued on, and liable thereon unless the second question presented by the defence, that the defendant was the agent of the company and the plaintiff proved against the company in respect of this note and received a dividend from the liquidator of the insolvent company, must be answered in his favour. The defendant had no consideration moving to himself in respect of this note, and it is only by reason of his relationship to the company, which relationship was that of an agent or actor of the company, that as against him there is any consideration to support the note; and that being so, the principle of election should be held to apply.

The plaintiff claimed against the company in respect of this very note, and though it may be true that he could not at law sue the company on this note as the company's name was not upon it, that is the company was not a party to it, according to his examination he did claim as against the company on this note and did receive a dividend thereon. His statement being, "I think that I sent in a claim upon the note sued on to the liquidator. I attended several meetings of the creditors. I voted on part of this claim. I stated at one of the meetings to the liquidator that I voted on part of the claim. It was the meeting before the last. I told the liquidator that I contended Mr. Howland owed part of the amount himself, and that I voted on the other part. I think that I had attended several of the meetings prior to that without raising the point. I had abstained from voting. I told the liquidator that I abstained from voting on the part that Mr. Howland was liable on."

In answer to the question, "Did you intend to continue to hold the company liable on that part that you contended Mr. Howland was liable on?" he replied: "I did not say anything about it; I thought that I would get it out of one or the other of them." In answer to the question, "Did you intend to hold Mr. Howland alone for the amount of the debt on that note?" he said: "I had not thought of that; I would hold him alone now; I got a dividend cheque from the liquidator on the whole claim, including this note; it was for \$284.73; I presume that this was on the whole claim; the cheque is dated April 30, 1884; I presume I received it about that time; I expect this was a dividend on the whole claim rendered; I never got the dividend; I left the cheque in my cash box; I have never used it in any way * * I think this was a dividend on the whole claim; I think 15 cents on the dollar."

Whether the creditor has elected to look to the principal or the agent is a question of fact to be tried by the jury, where there is a jury, and must depend, I presume, upon the circumstances in each case.

In *Curtis v. Williamson*, L. R. 10 Q. B. 57, it was held that

the mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after that undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor.

But the facts in that case are very different from what took place here. They were, as stated in the judgment of Quain, J., at page 58: "This was an action to recover the price of gunpowder bought of the plaintiffs by one Boulton in his own name, but in reality as agents for the defendants, and for the purpose of being used in a mine which was their property. The fact of the agency was not disclosed at the time of the purchase, but it afterwards became known to the plaintiffs that they were principals. After the plaintiffs had acquired this information, Boulton having filed a petition for liquidation of his estate, an affidavit in the usual form, for the purpose of proving under the liquidation for the price of the powder, was made by a clerk of the plaintiff, treating Boulton as their debtor, and was sent by post to Birmingham, to be filed in the County Court there, in which the proceedings in liquidation were carried on. Almost immediately after this affidavit had been posted the plaintiff's attorneys, being apprehensive that a claim against Boulton's estate might prejudice their rights as against the defendants, dispatched a telegram to their agent at Birmingham, directing him not to file the affidavit. The telegram, however, was too late, and was not received until after the affidavit had been filed; but no further step of any kind was taken by the plaintiff in the liquidation proceedings, nor has any dividend been received by them. Shortly after the affidavit had been thus filed this action was commenced against the defendants;" and it was held the plaintiffs had not elected to take the agent as their debtor.

On the principle of election, the same learned Judge, at page 59, uses this language: "There can be no doubt that in the absence of any alteration of the account to the prejudice of the principals, the plaintiffs, on discovering that

Boulton was merely an agent for the defendants, had a right within a reasonable time (*Smethurst v. Mitchell*, 1 E. & E. 622) to elect to proceed against the defendants: *Thompson v. Davenport*, 9 B. & C. 78, 86, unless in the meantime, with full knowledge as to who were the principals, and with the power of choosing between them and the agent (*Addison v. Gandassequi*, 4 Taunt. 374, and *Patterson v. Gandassequi*, 15 East 62), they had distinctly and unquestionably elected to treat the agent alone as the debtor. Principals and agent were equally liable upon the contract, and the vendor had a clear option as to which of them he would hold responsible. The question is, What is sufficient to constitute a binding election in point of law? In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding Judge, as was done in the case of *Calder v. Dobell*, L. R. 6 C. P. 486; but there may no doubt be cases in which the act of the contractee in regard to his dealings with, or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal."

That was a case the converse of this. The defendants, the principals, sought to avoid a just liability by setting up that the plaintiffs had lost their remedy by electing to look to the insolvent estate of the agent, who was liable only by reason of his not having disclosed at the time of purchase that he was acting not on his own account but for the defendants.

In this case I should hold as matter of fact the plaintiff, knowing all the circumstances, chose to proceed against the principal, at the time not intending to treat the defendant as personally liable, though, if I am right in the opinion I have expressed, he was so liable on the note. In the ordinary case of principal and agent I do not understand that the law gives a remedy jointly against both, though both are individually liable at the option of the creditor till he has announced his option, but from the

election of his debtor the other, whether principal or agent, ceases to be so. The proof against the company and acceptance of dividend, for the taking the liquidator's cheque and keeping it appears to me in every respect equivalent to a judgment against the company, established a binding election. As I have already pointed out, the defendant, if not to be treated as an agent but as principal in respect of an original dealing between him and the plaintiff, there is no consideration to sustain the note, unless the position of a surety can be assigned to him; but it is clear upon the evidence that he was not assuming the position of a surety, for on the contrary the evidence discloses that he did not intend to incur any personal liability at all, and the law makes him liable on the note because as agent the debt of the company was a consideration to support the note, and his manner of signing it precludes him from saying no liability was to attach to him upon it. But, apart from allowing him to deny liability from the beginning, the law does not preclude him from shewing the actual position of the parties, or that the plaintiff's own voluntary dealing in respect to the claim, absolves him from further responsibility. In any case where an agent signs his own name to any kind of contract he is personally liable thereon, unless it appears upon the contract itself that he is acting for another, and not for himself; and the only distinction between such contract and the contract made by a promissory note, is that upon the peculiar law relating to bills and notes no one not a party to a bill or note can be sued thereon, while in other contracts the principal may adopt the agent's position and sue, taking his choice of proceeding against the agent or principal; but I do not see why this distinction should prevent the consequences that flow from the principles of election.

In the present case the plaintiff should not be allowed to make this distinction in his favour, as he did in fact take proceedings against the company on this note, and received the benefit thereof, the company not disputing their liability.

There remains to be considered the question raised by the plaintiff's contention, that the note was signed by the defendant on behalf of the Toronto Patent Wheel and Waggon Company, Limited, without the name of the company, with the word "Limited" written after it; and so, under the operation of section 79 of 40 Vic. ch. 43, D., under the provisions of which Act the company was incorporated, the defendant became liable to pay the plaintiff as holder the amount of the note, the company not having paid it. The provision relating to this contention, is as follows: "If any director, manager, or officer of such company, or any person on its behalf, * * signs or authorizes to be signed on behalf of such company any bill of exchange, promissory note, endorsement, cheque, order for money or goods * * wherein its name with the said word" (Limited) "after it is not mentioned in manner aforesaid, he shall be liable to a penalty of \$200, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company." This note in one sense was undoubtedly signed on behalf of the company, that is, on account of a debt or obligation of the company; but it was not signed in the name of the company, and not so signed as to bind the company, or to make it appear it was the note of the company; and I take it to have been the intention of the Legislature, by this enactment to prevent the use of the company's name unaccompanied by the word "limited," which word was designed to notify persons dealing directly or indirectly with the company of the restricted and limited liability of the members of the company, and that it was not intended to prevent an officer in his own name giving a bill or note on behalf of a liability of the company to a creditor, the bill or note not purporting on its face to be on account of or on behalf of the company. In other words what was intended was to prevent the use of the name of the company, without the word "limited," appended.

It was held, in *Penrose v. Martyr*, E. B. & E. 499, that the secretary of a company under the provisions of the English Joint Stock Company's Act, 1856, 19 & 20 Vic. ch. 47, sec. 31, which, though somewhat differently worded, is to the same effect as our Joint Stock Company's Act, was personally liable on a bill drawn on the company by the name of The South Wales Steam Packet Company, the full name being "The South Wales Steam Packet Company, Limited," and accepted by the secretary as follows: "John Martyr, secretary to the said company."

Coleridge, J., in his judgment, at p. 503, expressed the intent of the Legislature thus: "The object of the Legislature obviously was, to force notice of the limited liability on those dealing with the company."

And Crompton, J., said: "I think that the intention of the enactment plainly was, to prevent persons from being deceived into the belief that they had a security with the unlimited liability of the common law, when they had but the security of a company limited; and that, if they were so deceived, they should have the personal security of the officer. Therefore I think we must see that the acceptance is one which, if the name had been right, would have bound the company."

In the present case there is nothing whatever on the face of the note that connects the company with it, or by reason of which it could be bound.

On the whole, therefore, but with considerable doubt as to the correctness of my conclusion upon the question whether the proof of the plaintiff against the company disentitled him to succeed, I am of opinion the judgment of my learned brother Galt at the trial should stand, and the plaintiff's motion be dismissed, with costs.

OSLER, J. A.—I agree with the Chief Justice that the defendant is not liable upon this instrument because of anything in sec. 79 of the Canada Joint Stock Companies' Act, 1877. That section declares what penalties and liabilities shall be imposed upon and incurred by the company and their officers for contravening sec. 78, which

makes it compulsory upon them to have the name of the former mentioned in legible characters on all bills of exchange, promissory notes, &c., *purporting* to be signed by or on behalf of the company.

I think it clear, for the reason stated in the judgment in *Penrose v. Martyr*, E. B. & E. 499, that the Act only require this to be done in the case of instruments which purport to be the obligations of the company.

There is nothing which forbids a director or other officer to agree to make himself personally answerable for, or to give his own obligation for, a debt or liability of the company. That, in fact, is what the plaintiff says the defendant has done in this instance.

But if his contention as to the construction of the section is right, it would follow that by doing so he has also incurred a liability to the penalty of \$200 imposed by that section, which reduces the argument to an absurdity.

The case therefore turns entirely upon the question whether, in the circumstances, this is the note of the defendant.

I agree that if it had been *issued and delivered by him* in its present shape, *as a note*, he could not escape liability merely by saying that he did not intend to become liable upon it, or did not know the legal effect of signing it as he has signed it, or because he supposed that it would be the note of the company and not his own note, or that he signed it merely as an agent. If it is his signature and he has not clearly shewn upon the face of the instrument that he merely signed it for some third party who is liable thereon in the character in which he has signed it, he must be treated as the contracting party, if it was intended as a contract at all: *Hagarty v. Squier*, 42 U. C. R. 165; *Laing v. Taylor*, 26 C. P. 416; *Alexander v. Sizer*, L. R. 4. Ex. 102; *Byles on Bills*, 13th ed., p. 37; *Story on Agency*, 8th ed., sec. 269; *Lyman v. Lovekin*, 20 C. P. 363.

But it is clear that the defendant may shew that the instrument was incomplete, or that something else was to be done to it before it became a contract.

In *Story on Promissory Notes*, 7th ed., p. 67 note, it is said: "A promissory note, like other written contracts not under seal, may be delivered subject to an oral agreement that it shall not take effect until a future time, or until something else has been done that the parties have agreed upon; and in such a case the instrument will have no operation until the condition or agreement has been performed, even if the delivery is made to the other party himself. * * This * * does not infringe the rule against admitting oral evidence to vary or contradict a written agreement; for in these cases the evidence is used, not to vary the contract expressed in the writing, but to show that no contract was entered into by the parties. * * Where the oral agreement is, that the writing shall not be a promissory note until the happening of the event agreed on, it does not vary or contradict a written contract, because *none* has been made. The writing is then no more the record of the contract than if it had remained in the hands of the maker, or had been placed in the custody of a third person."

Now in the case before us, it is not pretended for a moment that there was any agreement between the parties that the plaintiff was to obtain anything else than the note of the company in renewal of their existing over due note.

That is what he asked for; and it is an inference of fact that he knew the form in which such notes were signed and made by the company, as he had within the past few months received no less than four notes from them, including the one of which the note in question was intended to be a renewal, all of which bore the company's name as the makers thereof.

It is found as a fact by the learned Judge who tried the case that the plaintiff knew that the note was imperfect when he received it. A further fact which does not admit of controversy is, that when the defendant delivered it to the plaintiff or his book-keeper, he did not intend that it should come into existence as a note until it had been completed by the addition of the company's name and the

manager's signature, and the proper inference of fact from the evidence is, that it was so delivered to, and received by the plaintiff in order that he might procure it to be completed in that manner.

The neglect of the manager to affix the company's name, and, I may add, the neglect of the plaintiff to see that he got it, cannot convert the instrument into what, in the foregoing circumstances, in my opinion it never was—the note of the defendant.

For these reasons, which are based substantially upon the findings at the trial and upon my own view of the evidence, I think the motion should be dismissed. I am not clear that there may not be a perfectly valid defence on the ground of want of consideration, if it be possible to treat the instrument as a note in the absence of any proof of agreement or intention to give it for or on account of the company's debt: *Chalmers* on Bills of Exchange, 2nd ed., p. 85, 86, Art. 91.

I do not further consider this point as it was not argued before us.

I have not been able to see my way to a conclusion in the defendant's favour on the other ground, namely, the alleged election by the plaintiff to prove against the company in the winding-up proceedings, for if the instrument is really the defendant's note it is not a case of agency at all.

GALT, J., concurred with OSLER, J. A.

Motion dismissed.

[COMMON PLEAS DIVISION.]

CLARKE V. THE RAMA TIMBER TRANSPORT COMPANY
(LIMITED.)*Canal—Dam—Flooding land—Cause of damage—Negligence—Vis major—New trial.*

The defendants were incorporated by 31 Vic. ch. 66, O., with power to take and appropriate a slip of land 200 feet wide, and to construct and maintain a canal from Black river to Lake St. John, and thence to Lake Conchiching, with the full use and enjoyment of the waters of said river, and the tributary streams and Lake St. John for floating or moving logs; and to execute thereon all necessary works, but so as not to impair and injuriously affect the enjoyment of the present channels thereof; and to construct and keep in repair, subject to such provision, all locks, bridges, and erections necessary for said works; the price or the compensation for the lands taken in case of dispute, or for any lands flooded or injuriously affected by the company's works, to be settled by arbitration. The defendants under their statutory powers erected a canal, and at the point of commencement constructed two piers extending into the river; and in the St. John's creek, which flowed from Lake St. John to Black river below the canal, a dam was erected. A break occurred in the bank of Black river on the canal side beyond the piers, whereby large quantities of water from Black river flowed into the canal, and thus into Lake St. John. Owing to the formation of Black river below the junction of St. John creek therewith, the water in the creek at high water during freshets was backed up into Lake St. John and overflowed the plaintiff's and other lands at the head of the lake. The plaintiff contended that either by the break in the river bank whereby more water was brought down than usual, or by the dam preventing the water from flowing away, it remained longer than it otherwise would have done, and thus caused the damage complained of. Special questions were not submitted to the jury, and there was no finding by them as to whether the cause of damage, if any, was the dam or the break in the river bank. The jury found for the plaintiff.

Held, therefore, there must be new trial to ascertain whether the damage, if any, was caused by such dam or by the break in the river bank; and, if by the latter, was it the result of negligence or by *vis major*?

Quere, whether there was any liability cognizable in a court of law attachable on the defendants; and whether the compensation clause applied, the plaintiff's land not having been flooded under any right so to do claimed by the company.

THE plaintiff, the tenant of the north half of lot 22, in the second concession of the township of Rama, which, in his statement of claim, he described as lying near lake St. John, presented his causes of action against the defendants in two ways.

First, he alleged that he was entitled to have the water of the lake drained and carried away without obstruction by

the St. John creek, which was the natural outlet for the said lake; and that the defendants obstructed the flow of the said stream by erecting or continuing a dam or wall in the bed of the said stream, which prevented the water of the said lake from flowing by and away from his land; and the defendants also failed to maintain and keep the said dam in repair, and by reason of their neglect the water flowed over the land of the plaintiff.

Secondly, the defendants constructed a canal, or water channel, connecting Black River, in the said township, with the said Lake St. John, and used the waters of the said Black River for the purpose of supplying the said canal, and but for the said canal the waters of the said Black River would not have flowed into the said lake. And the plaintiff alleged that the said canal was constructed for the purpose of floating logs and timber from the said Black River at certain seasons of the year, and when not used for this purpose, was so constructed as to prevent the waters of the said Black River from flowing into the said lake; and owing to the defective state of the repair of the canal, and locks, and other works therein, and to the negligence of the defendants in allowing the same to become out of repair, the waters of the river found their way into the said lake; by reason of which the waters of the lake flowed over the plaintiff's lands in the spring of the year 1883, and caused damage to the plaintiff's crops, herbage, and bush, and deprived the plaintiff of the use of the lands to the extent of \$78; and subsequently an arbitration was held between the plaintiff and defendants, and the arbitrators awarded to the plaintiff, as damages for the year 1883, the sum of \$78, which amount the defendants have refused to pay.

The plaintiff further alleged, that unless the said canal and the locks, and other works thereon, were repaired and kept in repair, and the dam and obstructions in the said St. John creek removed, the plaintiff would continue to suffer damage through the flooding of his land by the water of the said Lake St. John; and he claimed payment of the said

sum of \$78 for damages, and an injunction restraining the defendants from maintaining the said canal and dams in their defective condition.

The defendants, the Rama Timber Transport Company, alleged in their statement of defence that they were and are a corporation duly incorporated by the Act 31 Vic. ch. 66, O., with power to construct and maintain a canal to connect Black River with Lake Couchiching, upon a strip of land two hundred feet wide, commencing at any point on Black River to Lake St. John, and thence to Lake Couchiching; and were entitled to the full use and enjoyment of the waters of the said Black River and tributary streams and Lake St. John, for the purpose of floating or moving timber or logs; and to execute such works on the course of the Black or St. John Rivers as would best and most economically secure the passage of timber and saw logs; and to construct and maintain all locks, bridges, and erections necessary for the said work; and to acquire the proprietorship of the said land; and that, pursuant to the powers of the Act, long before the matters complained of are alleged to have arisen, they acquired the proprietorship of the said strip of land, and constructed a canal connecting the waters of Black River with the waters of Lake St. John in accordance with the said Act, and their duties and powers under the said Act; and they put the plaintiff to proof of the several matters and things alleged by him in his statement of claim.

They further alleged that at the time of the flooding, there was an extraordinary freshet on the Black River, and the natural obstructions in the channel of the river below the said canal, and below the junction of the river and the St. John creek, caused the waters of the river to back up the creek and flood the plaintiff's land, for which the defendants were not responsible: that the said freshet caused the banks of the river to be washed away near the said canal, and the said river forced itself into the said canal, and thence into Lake St. John; and, it was not in the power of the said defendants to provide against the

same, but no greater flooding was caused thereby than would have resulted from the natural obstructions in the said river.

They also alleged that if the arbitration on the plaintiff's statement of claim ever took place, it was not binding on the defendants, and the defendants did not assent or agree to the said arbitration.

And the defendants, Thompson Smith & Son, alleged further that they were not liable for the alleged claim of the plaintiff; and that they were improperly joined as defendants.

The cause was tried before O'Connor, J., and a jury, at Toronto, at the Fall Assizes of 1884.

The evidence, so far as material, is set out in the judgment.

The jury found for the plaintiff, and judgment was accordingly entered in his favour.

During Michaelmas Sittings, *F. Arnoldi* obtained an order *nisi* to set aside the judgment for the plaintiff, and to enter judgment for the defendants.

During the same Sittings, *McCarthy*, Q. C., and *F. Arnoldi*, supported the order, and referred to *Nichols v. Marsland*, L. R. 10 Ex. 255, 2 Ex. D. 1; *Tucker v. Paren*, 8 C. P. 63; *Muskoka Mill Co. v. The Queen*, 28 Gr. 563; *Wardell v. Trenouth*, 24 Gr. 465; *The King v. Pease*, 4 B. & Ad. 30; *Vaughan v. Taff Vale R. W. Co.*, 5 H. & N. 679, 29 L. J. N. S. Ex. 247; *Dunn v. Birmingham Canal Navigation Co.*, L. R. 8 Q. B. 42; *Coe v. Wise*, L. R. 1 Q. B. 711.

J. K. Kerr, Q. C., contra, referred to *Geddis v. Proprietors of Bann Reservoir Co.*, 3 App. Cas. 470; *Cracknell v. Mayor of Thetford*, L. R. 4 C. P. 629; *White v. Corporation of Gosfield*, 2 O. R. 287, 291; *Northwood v. Corporation of Raleigh*, 3 O. R. 347, 358.

February 28, 1885. CAMERON, J.—From the evidence, it appeared the defendants, the Rama Timber Transport Company, in the year 1868 or 1869, cut a channel from the Black River on lot number 17, in the 5th concession of Rama, to Lake St. John, and at the point of commencement constructed two piers extending into the river with a space between of nineteen feet five inches, fitted with stop logs about ten feet from the flooring or bottom of the canal to the top, which could be taken out or put in to suit the requirements of the defendants in floating timber.

The evidence further shewed that on Sunday, the 15th day of April, 1883, the water in the river made its way through the bank adjoining the south pier, opening for itself a channel variously estimated from twenty to forty feet wide.

It appeared that on the canal side, beyond the pier, there was no protection to the canal bank, the canal being a trench dug through the natural soil varying in width. There was a bridge over the piers, and a travelled road along the bank of the river connecting on each side with this bridge, and, in the opinion of the witnesses for the plaintiff, the bank of the river was weakened by back water in the canal from time to time washing the earth away on the canal side behind the pier; but the evidence shewed the break that actually took place on Sunday was caused by the river breaking through. The evidence was that at the time of the break the water in the Black River was high; but it was conflicting as to whether it was higher than usual in time of freshet, that is, as to whether the freshet in the spring of 1883 was greater than usual.

It also appeared that a dam had been constructed in the St. John Creek, about three quarters of a mile from the lake, which appeared to have been erected by the defendants, the Rama Timber Transport Company, in the year 1881, according to the evidence of their foreman or manager, Thomas Cameron; but the preponderance of the evidence was that this dam had not the effect of raising

the water in the lake more than four or five inches, and could not have caused the injury the plaintiff complained of.

The evidence on both sides established, that owing to the formation of the Black River below the junction of St. John Creek therewith, the water in the creek at high water in time of freshet, was backed up into Lake St. John and overflowed the plaintiff's and other lands at the head or upper end of the lake; and the contest on the facts was as to whether the water had not remained longer than usual on the plaintiff's land owing to the break in the bank of the river bringing more water through the canal into the lake, which was a question of fact for determination by the jury; and if the question was properly left to them, the Court ought not to interfere with their finding unless the evidence very strongly preponderates against its correctness. Special questions were not submitted to the jury, and it is impossible to say whether they have found against the defendants by reason of their having erected the dam in 1881 in St. John Creek, or by reason of the excessive flow of the water from the Black River through the canal, which, owing to the terms of the defendants' Act of Incorporation, would be governed by different legal considerations.

It was not made to appear on whose land the dam in St. John Creek was erected; but if the evidence of the witness Cameron, who said the chains fastening the stringers of this dam were removed in the spring of 1883, so that it would cause very little obstruction, is not to be credited, and that would be a matter for the jury, it should be assumed against the defendants they still continued the obstruction up to the time of the alleged flooding of the plaintiff's land, and although it does not appear that the plaintiff is a riparian proprietor as the plan filed by the defendants, made by the witness Robinson, shews part of another lot with a road lying between his land and the lake, he would have a right to complain of the wrongful flowing of water upon his land to its injury. Should it appear that the defendants are not liable for any injury

that may have resulted from the flowing of the water of Black River through the bank of the river into the canal, and thence to the lake and the plaintiff's land, either by reason of their not being responsible at all for that act under the circumstances, or, if responsible, the extent of the compensation must be determined by arbitrators properly chosen under the Act, and not by a Court, it will be necessary to send the case again to a jury to determine whether the injury to the plaintiff has been caused by the dam in St. John Creek.

The defendants contend that they are not responsible for the alleged damage to the plaintiff, because, as far as the plaintiff is concerned, the Act of incorporation imposed no duty upon them, and unless by their voluntary act he has been injured he has no ground of complaint against them. It may be well to consider this question before dealing with the question of the tribunal to fix the compensation, if the plaintiff is entitled to any.

The power given to the defendants, the company, by their Act, 31 Vic. ch. 66, sec. 2, O., is:

1st. "To explore the country lying between the waters of the Black River, in the county of Ontario, and the eastern shore of Lake Couchiching; to designate and establish, and to take and appropriate for the use of the company and their successors, a strip of land two hundred feet in width, extending from any point on the said Black River * * to Lake St. John, and thence to Lake Couchiching."

2nd. (Sec. 3) "To construct and maintain a canal or canals, or timber slide, to connect Black River with Lake Couchiching, upon said strip of land, and shall have the full use and enjoyment of the waters of the Black River or tributary streams, and of Lake St. John, for the purpose of supplying said canal, and floating or mooring timber or saw logs; or may execute such works on the present course of the Black or St. John Rivers as may best and most economically secure the passage of timber and saw logs, so as that none of the works or acts of the said company, shall in anywise impair or injuriously affect the enjoyment of the present

channels of the Black and St. John Rivers and tributary streams." (Sec. 4) "To construct," subject to the last provision, "and keep in repair all locks, bridges, tow paths, works, and erections necessary for the said works."

The Act further provides: (Sec. 7) "After the said strip of land shall be set out and ascertained as required, for making and completing the said canals * * it shall be lawful for all persons who shall be entitled to any interest in said lands to bargain and sell such interest to the company, and the company may contract, compound, compromise, or agree with such persons as to the price to be paid for the said land; and in case of disagreement between the said company and any such interested persons, as to the price of or compensation for said lands * * or *for any lands flooded or injured by the works of the company*, it shall be lawful for such disagreeing persons to nominate one indifferent arbitrator, and for the company to appoint another indifferent arbitrator, who, together with a third to be chosen by them, shall award and order the amount to be paid by the company; Provided that any such award may be enforced or set aside in like manner as the awards of arbitrators in civil cases."

It is clear from these provisions the company had the power to make a canal on the strip of land they were empowered to acquire in any manner they pleased, subject only to the obligation not in anywise to impair or injuriously affect the enjoyment of the then existing channels by the persons having the right to the enjoyment of the Black and St. John Rivers and tributary streams. The St. John Creek is a tributary of the Black River. This being their right, the company have enjoyed it since 1868 or 1869, and their works were in sufficient repair for their purposes. The only want of repair disclosed by the evidence was the rot in the upper log of the pier, which does not seem to have in any manner tended to cause the breach of the river through its banks. It was not therefore the works as works, or their use for the purposes of the company, that caused the flooding complained of.

The provision in the Act with respect to keeping locks and bridges, works and erections necessary for the works in repair, is an enabling provision, made probably *abundantia cautela*, and does not cast any obligation upon the company that would not exist at common law.

If the company had made the opening through the bank forced by the river for the purposes of their business authorized by their Act, they would not, upon the authority of *Dunn v. Birmingham Canal Navigation Co.*, L. R. 8 Q. B. 42, have been liable, for they cannot be liable for doing that which the law allows or expressly empowers them to do. It would be a strange anomaly to hold them liable for that which they have not voluntarily done or authorized to be done, when if they had done the same thing voluntarily they would not have been liable for any injurious results flowing therefrom. The water of Black River which poured into the defendants' canal through the channel it made for itself, reached the lake through the channel of the canal, and not otherwise; and if its so reaching the lake can be treated as the act of the defendants, it must, I think, be regarded as an act authorized by their Act of Incorporation in leading the waters of Black River to Lake St. John; and upon the evidence it is shewn that the way so made was used by the defendants for the transport of timber and logs until the breach in the river's bank was repaired.

If then there is any liability resting upon the defendants to make compensation to the plaintiff, it must be in the manner pointed out in the seventh section of the Act. That section is certainly not framed with great lucidity, and may involve some difficulty in making it applicable in its literal terms to the present case. It evidently supposes that the company will claim the right to acquire or flood land, and will tender compensation therefor to the persons injured, who being dissatisfied therewith can have an arbitration in the manner indicated by the clause. In this case the defendants do not claim the right to take or flood the plaintiff's land. They deny that they have done

him any injury, and thus the case does not appear to be covered in terms by the clause.

But assuming that to be so, I can only say with Chief Baron Kelly, in *Dunn v. Birmingham Canal Navigation Co.*, L. R. 8 Q. B. 42, at page 47, in answer to the contention, "If this action could not be maintained, the plaintiff would be without remedy, as the compensation clause is not applicable. If that were so, then no doubt the Legislature may have inflicted a grievous injustice upon the proprietors of mines," the plaintiffs. "But still * * if the canal company have done no more than the Legislature have authorized them to do, and damage results, and although there may be no clause in the Act affording compensation, no action can be maintained."

I think, however, if the defendants have overflowed the plaintiff's land, a method may be found to bring them within the compensation clause, notwithstanding its defective construction.

This case is not, in its circumstances, like *Fletcher v. Rylands*, L. R. 3 H. L. 330, or *Nichols v. Marsland*, L. R. 10 Ex. 255, and 2 Ex. D. 1, as the defendants did not store up the water in their land from whence it escaped and damaged the plaintiff's property. What the defendants did was to replace the natural bank of the Black River for a certain distance with an artificial retaining wall, so to speak, joining on to the natural bank, and while this wall remains closed the water of the river keeps its natural course; and if the defendants had not been authorized by law to remove the river bank, I have no doubt they would be responsible to any one upon whose land the water of the river was cast by reason of the defendants' improper or negligent interference therewith, so as to lead it from its channel on to the land of another.

Assuming, however, that under the circumstances given in evidence in this case, the defendants could be held responsible, the question that was raised in *Nichols v. Marsland*, L. R. 10 Ex. 255, 2 Ex. D. 1, of *vis major*, should

have been submitted to the jury, and that question was not left to, or considered by the jury. The direction of the learned Judge that the defendants were bound to keep their works in repair, as far as this plaintiff is concerned, was one not warranted.

As the learned Judge is reported in the short-hand reporter's notes his language was: "As matter of law I tell you that the defendants were bound to keep it (the dam) in a good state of repair. What I mean is, as matter of law, these defendants (this company) were bound to maintain their dam in a good state of repair—in such a state of repair as to prevent injury to the property of others."

If I am right in the view that the defendants were not bound to have a dam or any other obstruction at the point of connection between the Black River and the canal or channel cut by them in pursuance of their powers, there could be no obligation upon them to keep such work in repair. There is nothing in the Act that requires the company to make piers or a dam at the junction. The fact of their having made these piers, fitted as they were with stop logs, imposed no obligation upon them to keep the logs in their place, and thus present a barrier to the flow of water from the river into the canal. Their duty was only not to interfere with the use and enjoyment of the channels of the river and tributaries by others having the right to the use and enjoyment of such channels.

I am therefore of opinion, if there is a liability attaching to the defendants cognizable in a court of law in the present case, the opinion of the jury would require to be taken whether the breach in the bank of the river was caused by a want of repair or by the freshet being of a character to amount to a *vis major* as defined by the judgment of the Court in *Nichols v. Marsland*, L. R. 10 Ex. 255, 2 Ex. D. 1.

The evidence shews that other persons than the defendants constructed and used a dam in St. John Creek, and I do not understand that the defendants assert that they

constructed this dam as part of their works. If it is to be considered as part of the work authorized by the defendants' Act of incorporation, and it causes an injury by flooding the land of the plaintiff, the method of ascertaining the compensation would be that prescribed by the statute, and this action would not be maintainable ; but the defendants have not so presented their defence either by their pleading or the evidence. In fact, as far as the pleading goes, the defendants have denied that the case comes within the compensation clause ; but they have set up as to the works at the Black River, that they were made and executed under their powers ; and on the argument Mr. McCarthy contended if the plaintiff were entitled to compensation it could only be in the manner indicated by the statute. The award, as I understand the parties, is not sustainable as binding upon the defendants. There was no evidence whatever given of a submission by the defendants, and the award was only used to fix the amount of damages as to which the defendants raised no objection, if they were liable in law.

I am of opinion, therefore, that there must be a new trial to ascertain whether the damage, if any, to the plaintiff by the act of the defendants, was caused by the dam in St. John Creek, or by the water coming through the breach in the bank of Black River ; and, if by the latter, whether the breach was the result of any negligence of the defendants or by *vis major*.

It is not necessary to express any opinion upon the merits as disclosed by the evidence, though I entertain a very strong one, as the parties have the right to have the opinion of the jury upon the questions of fact involved in the case.

GALT and ROSE, JJ., concurred.

Order absolute for new trial.

[COMMON PLEAS DIVISION.]

BOULTBEE V. BURKE.

Statute of Limitations—Part payment—Implied promise to pay residue.

To make a part payment take a debt out of the bar raised by the Statute of Limitations, it is sufficient if the payment be made in respect of a larger debt which is the one sued on. The payment of part is an act from which the inference may be drawn that the debtor intended to pay the balance though no special reference is made thereto at the time of such part payment.

In an action to recover the balance of an alleged debt to which the statute was pleaded as a bar, the debt was proved as also that several payments were made by the defendants thereon: *Held*, that an implied promise to pay the balance might be inferred; and therefore the statute did not apply.

THE statement of claim was on an account stated in June, 1873, at \$5,000, alleging subsequent payments made thereon to the amount of \$2,500; and claiming a balance due of \$2,500, with interest.

The defendant by his statement of defence denied that there had been any statement of account, or any payments thereon, or that there was anything due to the plaintiff; and also set up the Statute of Limitations.

The cause was tried before Galt, J., without a jury, at Toronto, at the Fall Assizes of 1884.

The evidence on the part of the plaintiff was, that prior to June, 1873, the plaintiff and defendant had been in partnership in a mill for the manufacture of lumber, and owned a tug in connection therewith; and also were in partnership in a farm: that in June, 1873, the partnership was dissolved, the defendant taking over the assets, and the parties had a settlement of accounts, but the plaintiff was to hold the tug as collateral security; and the following document was signed: "We hereby settle our accounts as to mill lumber, boat, and farming operations, &c., being an indebtedness of D. C. Burke to A. Boulton \$5,000; and it is hereby agreed upon by said Boulton as the amount due him." This was signed by both the parties: that in 1878, 1879, 1880, and 1881, payments were made on account of

the indebtedness to the amount of \$2,500, leaving a balance due of \$2,500.

The defendant denied that there ever had been a dissolution of the partnership, but that the document was signed merely to protect the business against creditors: that certain of the amounts had been paid the plaintiff out of the business; others on account of the sale of the boat; and a sum of \$300 paid in 1881, was in respect of a bargain made between the plaintiff, who was a member of the House of Commons, and the defendant, to procure for defendant's brother the appointment of Postmaster of Markham.

The defendant also set up the Statute of Limitations, and claimed that there was no evidence that the payments were made on account of the debt, or, if so made, were made under such circumstances from which a promise could be implied to pay the residue.

The learned Judge held that the evidence satisfied him that the document of June, 1873, was a settlement arrived at of the previously existing partnership between the plaintiff and the defendant; and the evidence also satisfied him that the sums of money paid by the plaintiff to the defendant were paid on account of that settlement; and he gave judgment in favour of the plaintiff for the amount claimed, with costs.

In Hilary Sittings, *Tilt*, Q. C., moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant, on the grounds taken at the trial; and also on affidavits.

During the same sittings, February 13, 1885, *Tilt*, Q. C., supported the motion. On the evidence the judgment should have been for the defendant. The defendant, however, is entitled to succeed on the Statute of Limitations. In order to cause a payment of part of a debt to take the debt beyond the operation of the statute, not only must it be shewn that the payment is made on account of a debt, but that such payment is made in respect of the debt for

which the action is brought : *Tippets v. Heane*, 1 C. M. & R. 252; *Davies v. Edwards*, 7 Ex. 22; *Morgan v. Rowlands*, L. R. 7 Q. B. 493; *Ball v. Parker*, 39 U. C. R. 488, in Appeal 1 A. R. 593, 608. The evidence here failed to bring the payments within the principle thus laid down. The affidavits clearly shew that the payment of the \$300 was for the obtaining of the office of postmaster, and not on account of the alleged debt.

H. J. Scott, Q. C., contra. On the merits the judgment was properly entered for the plaintiff. Then as to the statute. There is no difficulty as to the law. The whole question is, as to the application of the facts; and the evidence clearly shews that the payments were made on the debt now sued on. The affidavits filed in no way assist the defendant.

February 28, 1885. CAMERON, C. J.—The question involved in this case is one of fact rather than one of law, unless the contention of the defendant is entitled to prevail, that the payment by a debtor to his creditor of a portion of the debt without more, that is, without acknowledgment that there is a balance still due, or some declaration of the debtor to denote the payment is made in respect of a larger indebtedness, does not prevent the bar raised by the Statute of Limitations.

On the facts I am of opinion the finding of the learned Judge at the trial was right, and the judgment rendered in favour of the plaintiff should not be interfered with.

The settlement that the parties came to in 1873, signed by the defendant, establishes a debt at that time due by the defendant to the plaintiff of \$5,000, in respect of a partnership between them. The probabilities are in favour of the plaintiff's evidence that they ceased, and against the defendant's that they continued, to be partners after that time. If that be so, the payments made by the defendant after the settlement in 1873 would be referable to this claim, unless they were made on account of the purchase of the tug *Isabella*. The plaintiff denies that they were

made in respect of that vessel, and swears positively they were made on account of this debt, and that the vessel was only held by him as security for payment of the debt, and was at the request of the defendant transferred to the defendant's brother upon an arrangement to do so on receipt of the sum of \$750, on account of the debt of \$5,000. The defendant, on the contrary, alleges that some of the payments were in respect of the partnership business still carried on, others in respect of the purchase of the tug; and a sum of \$300, paid in 1881, was made in respect of a corrupt bargain with the plaintiff, a member of the Commons of Canada, to procure for the brother of the defendant the office of Postmaster. The learned Judge, who had the opportunity of both seeing and hearing the parties, has given credit to the plaintiff; and, even if we had considerable doubt as to the correctness of his conclusion on a review of the shorthand reporter's notes of the evidence, we ought not to interfere where the question is one to be determined on the credit to be given to the witnesses as it is in this case. But as I have already said, I think the finding of the learned Judge is fully sustained by the evidence.

There remains to be considered the question of law.

The contention of the defendant is wider and goes further than the law warrants, though beyond doubt the authorities, cited by Mr. Tilt, appear strongly to support the contention.

All that is necessary to be shewn to cause a payment of part of a debt to take the debt beyond the operation of the Statute, has been shewn in this case.

The requirements according to *Tippets v. Heane*, 1 C. M. & R. 252, cited by Mr. Tilt for that purpose, are, that the payment should be made on account of a debt; and, secondly, that such payment is made in respect of the debt for which the action was brought.

In that case the payment was made by the hands of a stranger, intrusted by the defendant with the money, without any information as to why the money was to be handed to the plaintiff or any reference to a debt due by the

defendant to the plaintiff. There was thus nothing to shew why the money was paid, and nothing, except the existence of a debt, from which any inference could be drawn that the money was given on account of such debt. If then as now the parties to the suit could have given evidence, the difficulty in the plaintiff's way might have been readily removed.

It may be conceded the payment must be made by the debtor as a payment on account, and that the creditor cannot by an act of his give to it an effect the debtor did not intend, by treating it and crediting it as a payment. But in the case of *Tippets v. Heane*, if it had appeared that the plaintiff had written to the defendant requesting him to pay the amount of his note, and the defendant had sent the £10, he did send to the plaintiff, there could be no reasonable doubt the payment could have been treated as a payment on account of the larger debt, and would have prevented the operation of the Statute of Limitations.

Thus, in *Wainman v. Kynman*, 1 Ex. 118, Baron Rolfe, said at p. 121: "In order to take the case out of the Statute, the circumstances must be such as to warrant the jury in inferring a promise to pay. Here there were circumstances from which such a promise might possibly have been inferred; but we think they ought to have been laid before the jury, and that the mere fact of part payment does not necessarily take the case out of the Statute."

In that case the defendant on being applied to for interest on a promissory note payable by him with interest, gave the plaintiff a sovereign and said he "owed the money but would not pay it."

Chief Baron Pollock, before whom the case was tried, told the jury that the intention of the defendant was immaterial, and that the mere fact of part payment was of itself sufficient to take the case out of the Statute.

This direction was held by the Court to be wrong; and that it should have been left to the jury to say whether he used the words, he "would not pay" in jest, and without any intention of refusing to pay.

In *Ball v. Parker*, 39 U. C. R. 488, at page 491, Harrison, C. J., said: "Part payment must be an act of the debtor, and is an acknowledgment by him of an existing debt, and from this acknowledgment the law infers a promise to pay the residue." And for this proposition, the learned Chief Justice cited *Morgan v. Rowlands*, L. R. 7 Q. B. 493, where it was held the payment of interest under a judgment recovered for such interest, the principal not having been sued for in the action on which the judgment was recovered, was not a payment sufficient to take the principal out of the operation of the Statute.

Part payment would seem to stand upon the same footing in regard to the Statute of Limitations as an acknowledgment.

Lord Blackburn, in *Morgan v. Rowlands*, L. R. 7 Q. B. 493, at page 498, says the principle in *Tanner v. Smart*, 6 B & C. 603, as to an acknowledgment has been applied in all cases upon part payment, particularly in *Foster v. Dawber*, 6 Ex. 839, and *Davies v. Edwards*, 7 Ex. 22.

In the same case, Hannen, J., said, at page 498: "I think it is clear that a part payment is not sufficient to take a debt out of the Statute of Limitations, unless it be such that a jury might fairly infer a promise to pay the remainder. No doubt very slight circumstances might be sufficient to support such an inference where there is a legal duty to pay."

The language of Baron Parke in pronouncing the judgment of the Court in the case of *Foster v. Dawber*, if taken literally, would seem to indicate that a part payment must be accompanied by an acknowledgment other than the payment itself affords, from which a promise to pay the balance may be inferred. His language is, at page 853: "But even upon the supposition of its being a part payment, it was not such within the Statute, for it must be a payment of a portion of the debt, accompanied by an acknowledgment from which a promise may be inferred to pay the remainder."

This language was applicable to the facts which shewed

there was in fact no payment ; and if what took place amounted to a payment of interest, such payment under the circumstances was not intended as an acknowledgment of any balance, but was intended to be a payment of the whole debt.

In *Davies v. Edwards*, Baron Parke, during the argument, said, at page 23 : " To take a case out of the Statute there must be a part payment of the debt, coupled with a promise to pay the remainder ; the party who makes the payment must in effect say : ' I make this payment on account of the debt.' "

In that case the payment was made not by the debtor himself, but by the assignee of his insolvent estate, and so was not a payment by which the defendant impliedly undertook to pay the balance.

The cases to which I have referred have been reviewed and considered in the case of *Ball v. Parker*, in the Queen's Bench, 39 U. C. R. 488, and subsequently in the same case in the Court of Appeal, 1 A. R. 593. But the question was not considered in the shape in which it has been presented by Mr. Tilt, on behalf of the defendant.

Treating the test as laid down in *Maber v. Maber*, L. R. 2 Ex. 153, to be, would the evidence given at the trial support a plea of payment ? If it would, such evidence of payment will take the case out of the Statute of Limitations. It is clear the evidence in this case made out a part payment.

Baron Bramwell differed from the rest of the Court as to the conclusion arrived at in that case ; but he concurred in the opinion of the other Judges that evidence sufficient to support a plea of payment would take the case out of the Statute. As to which he said : " I quite agree if the evidence given would have supported the plea of payment, then there is a sufficient payment of the interest to take the case out of the Statute of Limitations. "

It seems to me that all that is required to make a part payment take a debt out of the bar raised by the Statute of Limitations, is that it should be paid in respect of a

larger debt, and which debt is that which is being sued upon; and such payment when established will have the same effect as an acknowledgment in writing, when the larger debt is established to the knowledge of the debtor though he may not be aware of its precise amount. The payment of a part of it is an act from which the inference of fact may be drawn that the debtor intended to pay the balance without any special reference being made to the balance at the time of the partial payment. The debt here was proved; the several payments made by the defendant on account thereof were also proved; the evidence of the plaintiff being credited, and the existence of contradictory evidence would seem to make no difference. See *Maber v. Maber*, L. R. 2 Ex. 153.

There were circumstances then established from which an implied promise to pay the balance might be inferred by the Court or jury; and the Judge in this case having arrived at the conclusion the payments were made on account of the debt, the judgment should stand, and the defendant's motion be dismissed, with costs.

I should add that the affidavits filed do not furnish any ground for a new trial. Assuming the facts therein set forth to be true and the inference to be drawn therefrom to be that the defendant's brother furnished the \$300, which the defendant alleges were paid to the plaintiff on the corrupt bargain I have referred to, it would not affect the rights of the parties any further than to shew the defendant has received credit for a larger amount than he paid, and the judgment against him should be increased by that amount as the other payments were sufficient to take the case out of the Statute. But the facts set forth are not inconsistent with the plaintiff's evidence as the circumstances that the payment was made through a cheque made by the defendant's brother in favour of the defendant, and a letter of the plaintiff, not addressed to any one, asking for money urgently being found among the brother's papers are quite consistent with the plaintiff's statement, that the money was paid to him by the defendant and on account of the debt sued on.

ROSE, J.—I quite agree. The plaintiff distinctly stated that the payments in question were made on account of the admitted indebtedness, as to which the statutory bar had not then been raised.

Mr. Scott, asked: "What moneys has the defendant paid you, that you are aware of, on account of this claim? A. I know that he has paid me something upwards of \$1800."

Then follow the details, and again plaintiff is asked: "These sums you have spoken of have been received by you on what account? A. On account of that settled indebtedness. Q. The balance is still due? A. Still due."

On cross-examination it does not appear that the payments were not expressly made on account; and, as the learned Judge has given credit to the plaintiff, there seems to me no room on the facts for Mr. Tilt's contention.

GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION].

DONOVAN V. HERBERT.

Ejectment—Insolvent Act of 1875, secs. 68, 75—Proceedings under—Validity—Right of stranger to question—Possession—Damages.

In ejectment plaintiff claimed title under a deed from the assignee in insolvency of P. D. Prior to the issue of the writ of attachment in insolvency P. D. had conveyed the property to his brother L. D. Two of the creditors claimed that the deed was fraudulent, and made a demand under sec. 68 of the Insolvent Act of 1875 on the assignee to take proceedings to have the deed set aside, which the assignee, on instructions from the creditors, refused to do, whereupon the two creditors obtained from the Judge an order under that section authorizing them to take the proceedings on their own behalf. Proceedings were thereupon taken and the deed set aside. The land was advertised, the period therefor being shortened by the Judge, and was sold to F., but in reality to the plaintiff to whom F. conveyed. The assignee was notified of the sale and requested to execute a conveyance to the purchaser which, under instructions from the creditors, he refused to do, whereupon an order was obtained from the Judge directing the assignee to execute the deed, the assignee's solicitor attending and opposing the making of the order.

Under sec. 68 the "benefit derived from such proceedings shall belong exclusively to the creditor instituting the same for his benefit;" and under sec. 75, no sale is to be completed unless it "has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose or by the inspectors;" and also the period of the advertisement might be shortened "by the creditors with the approval of the Judge."

Held, ROSE, J., dissenting, that the sale and the deed thereunder was valid.

Per GALT, J.—The effect of sec. 68 was to withdraw the property from the general body of creditors, and to vest it in the litigating creditors; and, so far as regards proceeding under this section, creditors when referred to in the statute meant litigating creditors, and not the general body of creditors; and the sale having been sanctioned by such litigating creditors, sec. 78 had been complied with.

Per CAMERON, C.J.—Under sec. 68 the benefit to accrue from the proceeding passed from the estate to the litigating creditors; and the sanction of all the creditors referred to in sec. 78 was not requisite; but even if it were, the defendant, a mere stranger to the insolvency proceedings, was not in a position to raise the objection.

Per CAMERON, C.J., also.—An assignee under the Insolvent Act 1875, is not merely the executor of a power, but takes the legal estate which on conveyance by him vests in his grantee clothed with the trusts with which it was invested in the assignee.

Per ROSE, J.—The meaning of sec. 68 was not that the litigating creditors were to have the exclusive benefit of the proceeding without limitation, but merely the benefit thereof as creditors, that is, payment of their debts in full; but any surplus must go to the other creditors: that on the deed to L. D. being set aside the property did not vest in the litigating creditors, but was in the assignee who held it in trust to so distribute it, and this being a matter for the general benefit of the creditors it was subject to the other provisions of the Act,

and therefore to the provisions of sec. 78, which had not been complied with, so that no sale was made, and no title passed thereunder.
Re Jarvis v. Cooke, 29 Gr. 303, considered and commented on.
The defendant set up that he had a title by possession; and that the title was outstanding in a mortgage; but the evidence failed to establish it.

THIS was an action of ejectment tried before Galt, J., without a jury, at Toronto, at the Spring Assizes of 1884.

The facts so far as material are set out in the judgment.

The learned Judge found for the plaintiff holding the title proved, following the judgment in the action of trespass between the same parties reported, in 4 O. R.; also that the defendant failed to prove a title by possession; and assessed the mesne profits at \$200.

During Michaelmas Sittings, *Osler*, Q.C., gave notice of motion, returnable on the 22nd of May last, on the following grounds.

1. That the plaintiff failed to prove his title to the lands in question. 2. That the defendant showed title in himself by possession. 3. That the damages were excessive.

During Hilary sittings, February 10, 1885, *McCarthy*, Q. C., and *W. Nesbitt*, supported the motion. The first point is, that the plaintiff failed to prove such title in himself as would entitle him to recover. This raises the question as to the validity of the sale under the insolvency proceedings. The validity of the sale depends on section 78 of the Insolvent Act of 1875, as amended by section 20 of 40 Vic. ch. 41, D. This section provides that no sale is to be completed until it has been sanctioned by the creditors at their first meeting, or any subsequent meeting called for the purpose or by the inspectors. This section has not been complied with. The assignee occupies the position of a trustee. The law is, that where there is a trust with a discretionary power in the trustee to convey, and he conveys, though wrongly, if he acts within the scope of his authority the estate passes; but where he has only power to sell subject to conditions, the performance of the conditions are precedent acts to the right to convey, and if he conveys before the conditions

are complied with, then no estate passes. The latter is the position of an assignee under the statute. He holds the lands of the insolvent with a power to convey subject to the conditions of sec. 78, and such conditions are clearly precedent to the right to convey, and unless the conditions are complied with, no estate passes: *Re Jarvis v. Cook*, 29 Gr. 303. The plaintiff relies on sec. 68; but this section must be read in connection with sec. 78 as amended. Sec. 68 merely gives the right to realize the debt out of the property, but does not give any right to the property. If there is any surplus it goes to the assignee for the other creditors: *Société Général de Paris v. Geen*, 8 App. Cas. 606. The alleged sale to the plaintiff is absolutely null and void, and did not operate to divest the title out of the assignee and vest it in the plaintiff, and nothing passed to the plaintiff. The next point is, as to whether it is open to the defendant to raise the objection. He can clearly do so. This is an action of ejectment, and the plaintiff must recover on his own title; and therefore it is open to the defendant to shew that the title is not in the plaintiff. The defendant shews a title by possession: *Hooker v. Morrison*, 28 Gr. 369, 376-7; *Keffer v. Keffer*, 27 C. P. 257, 268; *Day v. Day*, L. R. 3 C. P. 751; *Thompson v. Bennett*, 22 C. P. 393. There was not proper evidence of the links in the plaintiff's title. The documents produced to prove the plaintiff's title were not sufficient. The original documents in insolvency should have been produced. The legal estate is in the mortgagee, and the possession is in the defendant: *O. J. Act*, sec. 17, sub-sec. 5. The damages were clearly excessive. The defendant should have been allowed for the taxes paid by him.

McMichael, Q.C., contra. As to the first point, the case is governed by sec. 68. This section provides that if any creditor desires to take any proceeding, and the assignee, under the authority of the creditors, refuses to take the required proceeding, and such creditor obtains an order from the Judge authorizing him to take such proceeding, the benefit to be derived therefrom belongs exclusively to the credi-

tor taking such proceeding. The effect of the section is, that the creditor instituting such proceeding under that section becomes absolute owner of what comes to him through that proceeding. Sec. 78 has no application; but in any event the creditors referred to therein, so far as sec. 68 is concerned, must mean the creditors taking the proceeding, and not the creditors generally. The case of *Re Jarvis v. Cook*, 29 Gr. 303, is quite distinguishable. That was a case of vendor and purchaser, and all it decides is that a doubtful title cannot be forced on a purchaser. The defendant, however, is not in a position to question the validity of the proceeding. This was a matter entirely for the creditors to the insolvency proceedings, and as they did not choose to raise any objection, it does not lie in the mouth of the defendant, a stranger to the insolvency proceedings, to do so. The defendant failed to prove a possessory title. The defendant merely occupied as licensee. But even if it be assumed that he did take possession, and became a tenant at will, a new tenancy within the twenty years was created. This clearly appears from the judgment in the previous action. See the case reported in 4 O. R. 635. The documents produced to prove the plaintiff's title were clearly sufficient. There was not sufficient evidence to shew that the title was in the mortgagee; but, if necessary, the mortgagee can be added as a co-plaintiff. The damages were in no way excessive. He referred to *Heath v. Pugh*, 6 Q. B. D. 345, 7 App. Cas. 235; *Waddington v. Roberts*, L. R. 3 Q. B. 579.

March 7, 1885. ROSE, J.—On the return of the motion herein it was ordered to stand until the former action should be decided in the Court of Appeal to which it had been carried.

The case was thereafter argued in that Court, and judgment given in favour of the defendant, on the ground that the plaintiff had failed to prove his title in that action. This of course left the plaintiff free to sustain the judgment in his favor in this action, if the evidence warranted it.

The motion accordingly came on for argument on the 10th of February, instant, when the following objections were taken to the proofs of the plaintiff's title.

1. That the sale under the Insolvent Act was invalid and passed no title.

2. That the original documents were not produced to evidence the proceedings in insolvency. We certainly should not allow this objection to prevail; and, if necessary, would allow the originals to be put in.

3. The legal estate is outstanding in a mortgagee.

4. As to defence, that a possessory title was shewn.

5. In computing damages no allowance for taxes paid, and sum excessive for the time covered by the allowance.

The proceedings in insolvency were in the estate of Patrick Doyle under the Insolvent Act of 1875.

It appears that prior to the issue of the writ of attachment the insolvent conveyed the property in question to his brother Lawrence Doyle. The assignee was appealed to by two of the creditors, viz., D. & J. Sadlier & Co., and John Murphy & Co., to take proceedings to have the conveyance set aside, and refused.

The demand upon the assignee was made pursuant to the provisions of sec. 68 of the Act which provides that "If at any time any creditor of the insolvent desires to cause any proceeding to be taken which in his opinion would be for the benefit of the estate, and the assignee, under the authority of the creditors or of the inspectors refuses or neglects to take such proceeding after being duly required so to do, such creditor shall have the right to obtain an order of the Judge authorizing him to take such proceeding in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the Judge may prescribe; and thereupon any benefit derived from such proceeding shall belong exclusively to the creditor instituting the same for his benefit and that of any other creditor who may have joined him in causing the institution of such proceeding."

The assignee having refused, an order was obtained from

the County Judge for the said D. & J. Sadlier & Co., and Murphy & Co., to take such proceedings as they might be advised in the name of the assignee.

Accordingly a bill was filed in the Court of Chancery praying to have the conveyance set aside, and for a sale of the land. The decree was merely for the setting aside of the conveyance. There was no direction as to the sale.

The record of the proceedings in the assignee's office was filed as an exhibit (the assignee being dead and his partner being examined as a witness at the trial.) And we find this as the last entry in the book. I extract it now, although a little out of order of time, because it will enable us to understand what was done as to the sale of the land.

"1881. April 21.

"Meeting of inspectors of this estate this 21st day of April, 1881. Present: Mr. Wood and Mr. Foster.

"Mr. Foster explained that Mr. Donovan had succeeded in his suit against Doyle, *and had taken and sold the land in question without reference to the assignee*, and had called on the assignee to sign and execute a deed of the land to the purchaser. The assignee had received no money, and it was doubtful if the estate had any interest in the matter.

"Mr. Morphy not being present Mr. Wood advised the solicitor to oppose the summons on the ground that the proceedings in disposing of the property had been taken without the knowledge or advice of the inspectors, and that he considered that any benefit over and above the amount of Donovan's claim should pertain to the estate."

It appears that after the decree, and on the 17th of December, 1880, an order was obtained from the Judge of the County Court of York, upon the application of Sadlier & Co. and Murphy & Co., shortening the period of the advertisement of the sale of the land to one month pursuant to the statute.

It is not shewn that the assignee had any notice of this order. It is clear he did not act upon it.

The advertisement under this order is not proven, or the fact of there having been an advertisement.

On the 6th of May, 1881, an order reciting a previous summons, no doubt the one referred to by Mr. Foster, was made on the application of Sadlier & Co. and Murphy & Co., and upon hearing the attorney for the assignee, directing the assignee to execute a conveyance of the interest of the insolvent in the lands in question to Thomas William Fisher.

On the 25th of May, 1881, a deed was executed by the assignee pursuant to the order, reciting the insolvency proceedings down to the decree, and then proceeded: "and further, that *D. and J. Sadlier and John Murphy & Co.*, in the name of the said Robert Hall Smith, *offered* the said lands for sale by public auction at the auction rooms of F. W. Coate & Co., in Toronto, on the said 5th day of March, at which sale the said Thomas William Fisher being the highest bidder for the same, became and was duly declared the purchaser thereof, at and for the price or sum of \$2,450."

Mr. Donovan, in his evidence at the trial, states as follows:

"Q. Then, in reality, the deed just put in from the official assignee to Fisher, you were the real purchaser, Mr. Donovan? A. Yes.

"Q. And Fisher was just your representative? A. Yes.

"Q. He had not the slightest interest in it, had he? A. No."

He further stated that the assignee was unwilling to execute the deed, and wanted the order of the Court.

Mr. McCarthy contended that the setting aside of the conveyance left the estate in the assignee and did not vest it in the creditors. This is, I think, clear.

It was further contended that the words "benefit derived from such proceeding shall belong exclusively to the creditor instituting the same for his benefit," must be taken to mean that the creditor would be entitled to have his debt paid in full, but that any surplus must be applied for the benefit of the debtor, that is, distributed among the other creditors in payment of their claims.

I confess such a contention was at variance with the view I formed while at the bar and was received by me with no favour. However, after much consideration, I feel constrained to yield to its force.

I have thought of the Act as in some sense an assignment or deed of trust executed by a debtor to secure his creditors' claims, either in part, if the liabilities exceed the assets, or in whole, if they are only equal to or less. In the latter case there is a trust to hand back to the debtor the surplus. See section 99 of the Act of 1875.

In such a view, suppose a deed conveying all the debtor's estate to a trustee for distribution among creditors, and a clause providing that if the trustee declined to realize any portion of the estate any creditor might do so at his own risk and for his own benefit; then a clause following, providing that any surplus of the estate should be handed back to the debtor, could it be fairly contended that a creditor, who had taken proceedings to realize an asset, had succeeded, and had recovered say \$1,000 more than his claim, could retain such surplus, or would not the benefit spoken of be construed to mean his benefit as a creditor? It will be remembered that no creditor is bound to take such proceedings. In most cases the dividend will be much less than the claim, and if he is willing to run the risk he may obtain a substantial gain in the payment of his whole claim.

Then again, if the creditor is entitled to retain the benefit without limitation, is he to give credit for the value or amount recovered on his claim? The statute does not in terms say so.

If it be a note that is to be collected, and he proceed and is successful, must he be allowed as against his debtor to recover a large sum of money, and still claim the whole amount of the debt? Unless some limitation is placed upon the meaning of the word "benefit," it must be so.

It will be remembered that the assignment or other vesting of the estate does not relieve the insolvent from payment of the creditors' claims in full. All estate which thereafter vested in him until his discharge immediately

became portion of the estate in the hands of his assignee liable to be taken possession of and distributed. Would it not be unfair that any creditor might reap such an advantage as against a man placed in such a position? If it is said that as against his debtor he must account for the surplus, then it follows that such surplus in turn must go to the other creditors.

I have read with much interest the case of the *Société Générale de Paris v. Geen*, in 8 App. Cas. 606.

In that case it was held under the Bankruptcy Act in force in England, that a creditor valuing his security ranks for the balance of his claim after deducting such assessed value; and, if his security realizes more than the assessed value, he must account for it; and, if less, he must lose the difference. The principle running through the case seems to be, that the bankruptcy proceedings do not deprive a debtor of his right to have his estate realized strictly for his benefit.

I need not stop to analyse that case as it would require an almost entire copy of the judgments to make it useful.

When an assignment was made, or other proceedings taken under the Insolvent Act of 1875, or other acts, to vest an estate in the assignee, did not such estate become a security for the whole body of creditors, to be realized at the best advantage *for the payment of the creditors*, and as much as possible so as to relieve the debtor, and must not such realization, so far as practicable, be consistent with the ordinary rules of equity and good conscience? It would be indeed shocking to one's notions of right, if a creditor who had a security could so realize it as to receive a large sum of money therefrom, and not give credit therefor on his claim; and is it any the less contrary to the principles of right for one of a body of creditors, for whose benefit a security is given, to obtain such an advantage at the expense of his debtor?

If the contention above considered is entitled to prevail it follows that the assignee when the decree setting aside the conveyance was made held the property in trust to

sell under the provisions of the section, and out of the net proceeds, first, to pay the claims of the creditors at whose instance the proceedings were taken; second, to distribute the balance among the other creditors in the ordinary manner.

If this was his duty, then the procedure and mode of sale were governed by the provisions of the Act.

It is clear that these were not followed. The clause under which the creditors seemed to have thought they were proceeding was section 75; but that had at the time been amended by 40 Vic. ch. 41, sec. 20, D., (1879). Reference to the two sections will shew that the Judge, in 1881, had no power to shorten the time for the advertisement, or to direct the conveyance by the assignee. The time was to be shortened by the creditors, with the approbation of the Judge.

The amending clause placed the whole power in the hands of creditors or inspectors; and it is provided "that no sale shall be completed unless (a) the proposed sale has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose, or by the inspectors; or (b) the assignee has advertised an auction sale or sale by tender in accordance with the directions in that behalf given by the creditors at their first meeting or at any subsequent meeting called for that purpose, or by the inspectors, and the inspectors sanction in writing the acceptance of a price not greater than the amount bid or tendered."

The section (75) further provides "that the period of advertisement may be shortened to not less than one month by the creditors with the approbation of the judge."

The creditors did not, in my opinion, shorten the term.

It is manifest that not one of the steps, without which the statute says, "no sale shall be completed," was taken; and that no sale was made by or through the assignee at all.

It is clear, of course, that the plaintiff was aware of what was, and what was not done. Then did such want of

observance of the requirement of the statute prevent the title passing?

In my opinion it did. I think the orders of the Judge were invalid: that he was without jurisdiction or authority to make them; and that the assignee could only vest the estate by a sale and conveyance in the mode pointed out by the statute. Sec. 76, says: "All sales of real estate so made by the assignee shall vest in the purchasers all the legal and equitable estate of the insolvent therein," &c.

Not only was there not a sale "*so made*" as provided by the 75th section, but it is clear there was no sale at all. Mr. Donovan seems to have been the real plaintiff or party for whose benefit all these proceedings were taken, and he goes through a form not authorized by any statute to *sell to himself*.

I do not suppose that if the assignee, in selling the estate, acted under a statutory power merely, it would be contended that the title passed.

It has so been held by the late Chief Justice of Ontario, then Chancellor, in *Re Jarvis v. Cook*, 29 Gr. 303, at p. 306.

I am content to accept his opinion—glad to rest upon an authority so high, upon a subject in which he was by universal acknowledgement so learned.

If it is said that his observations must be confined to the case before him, and in that case he was deciding between vendor and purchaser, I can only say he has given an opinion on the section in question, and has not limited his opinion, but, both by declaration and illustration, has clearly said that the act was under a power.

It will not be forgotten that the estate the assignee conveys is only the "estate of the insolvent therein:" that in case of death of the assignee the estate remains under the control of the Judge, and does not vest in the heirs of the deceased assignee—see sec. 46; and that in the sale of the estate he "shall exercise all the rights and powers of the insolvent in reference to his property and estate."

If I have taken the correct view of this objection the plaintiff must fail, as no title vested in him under the proceedings in insolvency.

The defendant also contended that the plaintiff had shewn that he had no right to recover, because the legal estate was in Mr. Mulock as mortgagee, who, according to the plaintiff's admission, was entitled to the "legal possession."

The evidence is as follows :

Q. And there is a mortgage outstanding on it, is there not? A. Yes.

Q. To whom? A. Mr. William Mulock.

Q. And the legal estate in him? A. I have a right of possession.

Q. The legal possession is in him? A. Yes.

Here the evidence on this point rests. There is no application to amend by adding the mortgagee, and no evidence to shew the facts to be otherwise than as thus baldly stated.

If the legal estate and the right of possession were both in the mortgagee at the time of bringing the action the plaintiff cannot succeed.

It is thus, in the view I have taken, unnecessary to consider whether the defendant had shewn a statutory title by possession. I think, had it been necessary to determine this question, I should have difficulty in finding in the defendant's favour. I certainly agree that nothing appears upon the record to lead me to intend anything in his favour.

It is also unnecessary to say anything as to the damages.

GALT, J.—The question in this case arises under the insolvency of one Patrick Doyle, against whom a writ of attachment was issued under the Insolvent Act of 1875, and amending Acts, on 27th July, 1877. The insolvent Patrick Doyle purchased the land in question from one McMahon on the 27th of September, 1853. This title was proved. On the 27th of August, 1859, Patrick Doyle pretended to convey the land to one Lawrence Doyle. In August, 1876, a bill in Chancery was filed by two of the creditors of Patrick Doyle and Lawrence Doyle to set aside

this conveyance, which was dismissed, with costs. I mention this, not because it has any direct bearing on the question as between the present parties, but as leading up to what really, so far as the plaintiff is concerned, is the turning point of his title.

After the attachment had issued and the assignee and inspectors had been duly appointed, namely, on the 11th of January, 1878, at a meeting of the inspectors the assignee laid before the inspectors a letter from Mr. Donovan, attorney for two creditors, viz: Messrs. D. & J. Sadlier & Co., and John Murphy & Co. requesting the assignees to file a bill in Chancery to recover certain lands conveyed by the insolvent to his brother Lawrence in the year 1859. "Ordered that inasmuch as this matter has already been before the Court of Chancery and the Court of Appeal, and adjudicated thereon, the inspector cannot, in the absence of further evidence, advise the assignee to involve the estate in any expense, allowing the parties interested to take such action as they may deem advisable."

This was signed by the inspector.

On the same day the assignee wrote Mr. Donovan as follows: "In compliance with your request I called a meeting of the inspectors herein, and laid before them your letter of yesterday asking them to advise me in relation thereto, and under the authority of the said inspectors, I refused to take the proceedings asked for by you on behalf of Messrs. D. & J. Sadlier and John Murphy & Co., claimants herein."

It is not in my opinion possible there could be a more distinct refusal to take proceedings on the part both of the inspectors and assignee. A refusal, not because they thought it inexpedient as being doubtful, but on the express ground that the right of the parties had been concluded by the judgment of the Court of Appeal.

Upon receiving this decision these creditors took proceedings under the 68th section, the result of which was the Court of Chancery declared the conveyance from Patrick Doyle to Lawrence Doyle to be null and void, and consequently

the legal estate in the lands therein mentioned which are those now in dispute, became vested in the assignee, Smith.

The only question we have to decide is, whether that estate has been conveyed to the plaintiff, and those through whom he claims. A good deal was said on the argument before us as to the rights of other creditors or of the insolvent in the surplus value if the lands produced more than sufficient to pay their claims in full. But this defendant has nothing to do with that. He asserts a right to keep the land irrespective of the creditors or of the assignee; and it is, so far as he is concerned, of no consequence whether the proceedings taken under the 68th section were advantageous to the litigating creditors or not.

It was very strongly urged by the learned counsel for defendant that in an action like the present the plaintiff must recover on his own title. This is unquestionably correct; and consequently, although the defendant has no right to question the position occupied by the parties through whom the plaintiff claims as respects other parties, he has a right to dispute the validity of the sale from the assignee to Fisher to whom the assignee conveyed on 25th May, 1881.

The decree setting aside the conveyance to Lawrence Doyle was made on the 8th November, 1880.

On the 17th December, 1880, an order was made by the County Judge shortening the period of advertisement of of the sale of the real estate for one month, pursuant to the statute in that behalf.

On the 21st April, 1881, the following entry appears in the minutes of the assignee. "Present: Mr. Wood, and Mr. Foster. Mr. Foster explained that Mr. Donovan had succeeded in his suit against Doyle, and had taken and sold the land in question without reference to the assignee, and had called on the assignee to sign and execute a deed of the land to the purchaser, the assignee had received no money, and it was doubtful if the estate had any interest in the matter. Mr. Morphy not being present, Mr. Wood (Mr. Morphy and Mr. Wood were the inspectors),

advised the solicitor to oppose the summons, on the ground that the proceedings in disposing of the property had been taken without the knowledge or advice of the inspectors; and that he considered that any benefit over and above the amount of Donovan's claim should pertain to the estate."

In pursuance of this resolution the solicitor for the assignee did oppose the summons, for we find the following order made by the County Judge on the 6th May, 1881: "Upon reading the summons, granted in this matter at the instance of D. & J. Sadlier & Co., and John Murphy & Co., and upon hearing the attorney for Robert Hall Smith, the assignee for the above insolvent, I do order that the said Robert Hall Smith do execute a proper conveyance to Thomas William Fisher, &c"

In pursuance of this order the said Robert Hall Smith did, on the 25th May, 1881, convey the lands now in question to the said Thomas William Fisher, through whom the plaintiff claims.

There is no dispute as to the validity of any of the intermediate conveyances.

It is plain from the foregoing statement that the assignee and inspectors had been heard before the learned Judge before the order for the deed was made, so it cannot be said the proceedings were taken without their privity.

Mr. McCarthy contends that this deed is void not being in compliance with the provisions of sec. 78 of the Act of 1875.

The validity of this contention depends, in my opinion, on the construction to be placed on sec. 68 under which proceedings had been taken by certain named creditors, to set aside the deed to Lawrence Doyle, as already stated. It is necessary to refer somewhat at length to that section.

Sec. 68. "If at any time any creditor of the insolvent desires to cause any proceeding to be taken which in his opinion would be for the benefit of the estate and the assignee, under the authority of the creditors or of the

inspectors refuses or neglects to take such proceeding after being duly required to do so, such creditor shall have the right to obtain an order of the Judge authorizing him to take such proceeding in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the Judge may prescribe; and, thereupon, any benefit derived from such proceeding shall belong exclusively to the creditor instituting the same for his benefit, and that of any other creditor who may have joined him in causing the institution of such proceeding."

In my opinion the true construction to be placed on the above section is to withdraw the subject matter thus brought to the notice of the assignee and inspectors, upon their refusal to take proceedings, from the control of the general creditors and to invest it in the creditors so acting; and that in all subsequent reference to "creditors" as a class contained in the statute, the term "creditors" should be applied to the litigating creditors only, and not to the general body of creditors.

It is manifest this was the view of the learned Judge in the Insolvent Court for in all the proceedings taken before him, the names of the litigating creditors of D. & J. Sadlier & Co. and John Murphy & Co. appear. For example, in the order shortening the period of advertisement, and also in the order directing the assignee to execute the deed of conveyance; and no reference is made to any other creditors.

Let us now consider the provisions of the 75th section. "The assignee may sell the real estate of the Insolvent, but" as amended by 40 Vic. ch. 41, sec. 20, D., "in any Province other than Quebec no sale shall be completed unless (a) the proposed sale has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose."

In the present case the sale was sanctioned by the litigating creditors; and for the reasons already stated, I consider them as representing the whole body of creditors. It is unnecessary to refer to the other provisions of the 75th section as they are in the alternative.

It must moreover be borne in mind that, although it is not necessary to show the approval of the Judge in Insolvency, the sale in this case was approved of by him after hearing counsel not only for the litigating creditors but for the assignee of the estate representing the whole body.

In my judgment, therefore, the deed from Smith to Fisher is valid, and the plaintiff is entitled to judgment.

As respects the question of excessive damages, it was urged that defendant should be allowed credit for the taxes paid by him. I cannot accede to this contention. He was in possession of the land, and consequently he was the proper party to pay the taxes.

As regards the outstanding mortgage I fully concur in the observations made by the Chief Justice in his judgment; and, if necessary, the mortgagee can be added as a plaintiff.

CAMERON, C. J.—I have had the advantage of perusing the judgments of my learned brothers as well as having discussed the questions involved in this case with them, and have, after giving the several points presented, and the arguments of counsel in support thereof, the fullest consideration in my power, come to the same conclusion that my brother Galt has reached, and am of the opinion the plaintiff is entitled to retain the judgment entered for him upon the trial.

I will briefly state the reasons that in my opinion warrant this result.

Upon the question of the Statute of Limitations barring the plaintiff's right to recover, the merits appear altogether with the plaintiff. Under the evidence the defendant does not seem to have had an exclusive possession of the land, but merely a license from the owner from time to time to enter upon it, and deposit material of one kind and another, such deposit not giving him actual possession of the land, and his entries from time to time, without the license he had received, would have been so many distinct and separate acts of trespass,

and would not be lawful acts referable to any lawful or other exclusive possession of the land obtained by the first entry under the license to deposit material.

The case is materially different from one where a party enters wrongfully or by permission and assumes the right to the exclusive possession of the land, because, in either of those cases, for the time being actual possession is taken and the owner is dispossessed and his dominion interfered with ; but where a person crosses another's land from time to time, he may by a sufficient user in that way acquire an easement so to use, but he does not acquire possession of the land thereby.

The next question I shall consider is, the validity of the title of the plaintiff, which resolves itself into two branches. First, was the title acquired by the deed of the assignee in insolvency impeachable by the creditors ? Secondly, if so impeachable, has this defendant, a stranger to the proceedings in insolvency, any right to avail himself of an objection that would render the deed void as against creditors ?

As I understand the position assumed by Mr. McCarthy it is, that the sale of the land not having been authorized by the creditors at their first meeting, or at a meeting specially called for the purpose, or by the inspectors, the deed of the assignee conveying to Fisher, through whom the plaintiff claims, is absolutely void and of no effect, and did not operate lawfully or otherwise to divest the title which the law gave to the assignee ; and he strongly relied upon the decision of the late able and learned Chief Justice of the Court of Appeal, while Chancellor, in *Re Jarvis v. Cook*, 29 Gr. 303.

That case was no doubt well decided. The vendor was seeking to make the purchaser accept a title derived through a sale by an assignee in insolvency, without the sale having been advertised for the time required by the statute ; and, while the learned Chancellor did say, at p. 306 : "The general rule is, that where trustees, or quasi trustees act under a power, the power must be followed ; and so a mortgagee, selling under a power of sale in his mortgage,

must observe the terms of the power of sale," he decided the question in favour of the purchaser, on the ground that the construction of the statute was at best open to doubt: and he proceeded: "The words used in the Acts authorizing sales in execution and for non-payment of taxes are essentially different from the words used authorizing sales in insolvency. It must, to say the least of it, be doubtful whether the words used in the Insolvent Acts would receive the same construction as the words used in the other Acts; and such being the case my opinion is, that the first objection taken by the purchaser has been well taken."

It was not therefore essential to the determination of the question before the learned Chancellor to hold the sale void *in toto*. It was sufficient that there appeared a doubt as to the validity of the sale by the assignee and a title that might be questioned by others interested in the estate as creditors of the insolvent. The case is certainly no authority for this defendant being allowed to question the sale; but I quite concur in the opinion of my brother Galt, that section 75 of the Insolvent Act of 1875 has no application to the sale of the land in dispute, which must be held to have taken place under the power and rights given to the creditors, D. & J. Sadlier & Co., and John Murphy & Co., and their action superseded all interference by the assignee, his name only being used as the legal representative of the rights of the insolvent, but the control and management of the proceedings, and any benefit to accrue therefrom, are given to the creditors who obtained the authority of the Judge to take the proceedings.

The provision of the clause, after the creditor has obtained the Judge's order is, "thereupon any benefit derived from such proceeding shall belong exclusively to the creditor instituting the same for his benefit, and that of any other creditor who may have joined him in causing the institution of such proceeding." Language could scarcely be made stronger to shew that that which the general creditors abandoned as valueless, the creditor who

was willing to bear the expense of the proceedings necessary to determine whether it was worthless or not, should reap any and all advantage that might accrue therefrom. But that such was clearly and unequivocally the intention of the Legislature is made still more manifest by the language which follows: "But if before such order is granted, the assignee shall signify to the Judge his readiness to institute such proceeding for the benefit of the creditors, the order shall be made prescribing the time within which he shall do so, and in that case, the advantage derived from such proceeding shall appertain to the estate."

The only reasonable conclusion, it seems to me, that can be drawn from this is, that up to the time of signing the Judge's order the assignee has a right to reconsider his refusal to institute proceedings, but when the order has been signed all benefit to accrue from the proceeding passes from the estate to the individual creditor. Whether the provision must be interpreted so as of necessity to exclude the estate or the insolvent from claiming any surplus after paying the creditor's debt and expenses, does not, it seems to me, arise in the present action; for assuming that such surplus belongs to the estate or insolvent, it by no means follows that in realizing the abandoned claim all the forms requisite for the general disposition of the estate are to be followed.

I am therefore of opinion, the plaintiff is entitled to succeed, on the broad ground, that in this case the sanction of the creditors to the sale of the land was not essential.

But if it had been the defendant is not in a position to question the validity of the proceedings, or to take advantage of any omission or failure to observe some preliminary requisite of the statute to a sale and conveyance. If the preliminaries had been observed the legal estate passed to Fisher, the purchaser at the sale. If they were not observed the creditors, or any of them, might have caused the sale to be set aside. They have not thought fit to do so, and, in my judgment, it must be assumed that every-

thing that was requisite to a valid sale was done, and all this plaintiff was required to do as against a stranger to the estate, was to shew the estate vested in the assignee, and a conveyance by him which, assuming everything had been rightly done, was sufficient to pass the estate.

The most formidable way of stating the case for the defendant was that adopted by Mr. McCarthy, that the assignee was by the statute only the executor of a power : that in effect the land was the land of the insolvent, with a power in the assignee to convey it in a particular way. But this is hardly the position of an assignee.

By the attachment against or assignment made by an insolvent his estate is vested in the assignee. No one except the assignee can convey it; and while the statutory effect of his conveyance is to vest in the grantee the estate or interest of the insolvent, it also vests in such grantee the legal estate which has become vested in the assignee by operation of the statute.

When at the bar I never doubted that the legal estate passed from a trustee to his grantee, though such conveyance was in contravention of the trust and a clear breach of it, and the person who took the legal estate took it clothed with the trusts with which it was invested in the trustee.

This position is thus briefly stated by the late Sir John Robinson, in *McCallum v. Boswell*, 15 U. C. R. 343 : "The plaintiff claimed under a conveyance" (a mortgage) "of the fee, though subject to a condition, from a person who was seized as joint-tenant with another of the legal estate. His making the mortgage seems to have been a breach of trust, but that would not prevent his conveyance from operating at law."

The case cited and relied upon by Mr. McCarthy, of the *Société Générale de Paris v. Geen*, 8 App. Cas. 606, does not appear to me to have any application to the present case. It would have some bearing if a creditor of the insolvent estate of Patrick Doyle were seeking to impeach the plaintiff's right by an action to set aside the sale to the plaintiff, or for an account.

The sale in this case was authorized by the Judge of the County Court, and if in so doing he exercised or exceeded his powers his judgment or order should have been appealed against and not be attacked in an entirely collateral proceeding. The effect of allowing this defendant to take advantage of any irregularities in the insolvency proceedings would be, probably, not only to defeat the claim of the plaintiff, but also of the general creditors of the estate.

There remains to be considered the objection that the plaintiff had mortgaged the land, and that the mortgage was outstanding and the legal estate vested in the mortgagee.

Whatever effect would have to be given to this contention, if the mortgage had been proved, I do not think there was any proof of such outstanding mortgage sufficient to entitle the defendant to succeed.

There was no evidence on the point except that given by the plaintiff himself on cross-examination, and his evidence was as follows: "There is a mortgage outstanding on the property to Mr. William Mulock. I have a right of possession; the legal possession is in Mr. Mulock."

This, I think, falls far short of evidence sufficient to displace the legal paper title of the plaintiff, and amounts only to an opinion of the plaintiff that, while he (the plaintiff) has the right to the actual possession of the land, the so-called legal possession, whatever that may mean, is in Mr. Mulock. The defendant cannot be allowed to succeed on this. If he desired to rely upon that defence, he should have proved that which is called a mortgage, and shewn its terms, so that the Court could see what the plaintiff's opinion that he had the right to the possession, while the legal possession was in Mr. Mulock, meant. The actual possession is at present in the defendant, or there would have been no need for this action. But were this objection of weight, the plaintiff should have the opportunity of making Mr. Mulock a party, as he is in the same interest, as far as this defendant is concerned, as the plaintiff, if the mortgage is one from the plaintiff to him.

On the whole case, I am of opinion that the plaintiff's judgment should stand, as I do not see, under the circumstances, any good reason for interfering with the finding of my learned brother Galt as to the amount of damages, considering the defendant is, if the title is in the plaintiff, a wrong doer, and not entitled to any very favourable consideration for his attempt to acquire property that he knew did not belong to him by setting up the Statute of Limitations to bar the plaintiff's right.

I would add that I have not overlooked the fact that Fisher, who first acquired title from the assignee, was, in fact, the agent of and acting for the plaintiff; but I think that makes no difference whatever. The plaintiff would have had exactly the same rights if he had taken a conveyance direct from the assignee. There was nothing, as far as this defendant is concerned at all events, to prevent his having taken the conveyance to himself, and he acquired no less or greater right in taking the title through an agent.

Motion dismissed, with costs.

[Affirmed on appeal.]

[COMMON PLEAS DIVISION.]

BEASLEY V. THE CORPORATION OF THE CITY OF HAMILTON.

Accident—Negligence—Notice—Demurrer to paragraph of defence.

Statement of claim claiming damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole in the sidewalk alleged to be defective, &c., through defendants' negligence. By the first paragraph of the statement of defence defendants denied the correctness of the statements contained in the statements of claim; and by the second paragraph set up that defendants had no notice or knowledge of the defect.

Held, on demurrer to the second paragraph, that the whole statement of defence must be read together; and that the second paragraph taken with the first constituted a good defence or was immaterial: that it could not embarrass the plaintiff, for if he proved actionable negligence he must prove either actual or presumptive notice.

THIS was a demurrer by the plaintiff to a paragraph of the defendants' statement of defence.

The claim was for damages caused to the plaintiff by stepping upon the covering or lid of a manhole in the side walk, on Augusta street, in the City of Hamilton, "the said covering or lid being defective, loose, and out of repair, through the default and negligence of the defendants in that behalf."

The defendants "deny the correctness of the statements contained in the plaintiff's statement of claim;" and say in paragraph two "the defendants had no notice or knowledge that the covering or lid mentioned in the statement of claim was defective, loose, or out of repair."

To this the plaintiff demurred, assigning as a ground that "it is the duty of the corporation to keep its streets in repair, and if its liability to do so has for any reason ceased, the special circumstances of the case should be pleaded."

On March 10, 1885, the demurrer was argued.

A. D. Cameron for the demurrer.

MacKelcan, Q.C., contra.

March 16, 1885. ROSE, J.—As I read the statement of defence it amounts to this: “We, the defendants, say that the lid was not defective, loose, or out of repair, through our default or negligence, and, if it was defective, loose, or out of repair, we had no knowledge of the fact.”

It may be that in denying negligence it was unnecessary to plead want of notice, as if the defendants were bound to repair, and had notice of the want of repair, such notice would be evidence of negligence.

The whole pleading must be read together. A demurrer should not be directed against a paragraph unless it raise a distinct ground of defence: Rules 189 and 190, and notes. The division into paragraphs is for convenience only. One paragraph alone might constitute no answer, taken with others it might make a good defence, or prove immaterial.

I think, in this case, the whole pleading should be read together, and that the second paragraph taken with the first, either constitutes a good defence or is immaterial. It certainly cannot embarrass the plaintiff at the trial, for if he prove actionable negligence, he must prove either actual or presumptive notice.

The demurrer must be overruled, with costs in the cause to the defendants in any event of the cause.

Judgment for defendant.

[COMMON PLEAS DIVISION.]

RE BORTHWICK AND THE CORPORATION OF THE CITY OF
OTTAWA.*Market by-law—Sale of fresh fish.*

A by-law of the city of Ottawa set apart certain sections of the city, six in number, as markets or market places. Four of these sections were called meat, produce, and fish markets, though in the enumeration of the articles for the sale of which the markets were established, fish were not named.

Section 5 of Art. IV. declared that all produce, provisions, or articles of any kind brought to any of the meat, fish, and produce markets and exposed for sale, should be placed in boxes and exposed in carts or other vehicles, which should be placed upon said markets under the direction of the market inspector. Any person refusing to comply therewith, or to remove such articles, vehicles, or boxes after selling their contents, should be subject to the penalty imposed by the by-law, and liable to expulsion from the market.

Section 1 of Art. IX. declared that no person should sell any fresh fish elsewhere than in such places as should be allotted and designated by the standing committee on markets, in any of the aforesaid markets. Sec. 1 of Art. X. declared that the vendors of any articles in respect of which a market fee might, under the Municipal Act, be imposed, might lawfully without paying market fees, offer for sale any such articles at any place within the city excepting the market places thereof. The by-law was a consolidation of previously existing by-laws passed from time to time. It appeared that many years ago certain stalls in each market were set apart as fish markets: that no application was ever made for standing room for carts or other vehicles from which to sell fish; and no provision made by the council for so bringing fresh fish to the market.

Held, that sec. 5 of Art. IV., though wide enough to cover fresh fish, would appear not to have been framed with reference to it; and that reading sec. 1 of Art. IX. and sec. 1 of Art. X. together, they could be reconciled by construing them as providing that fresh fish might be sold in stalls and nowhere else in the markets, but outside of the markets no restriction should be placed on selling.

THIS was a motion to quash so much of By-law No. 588, of the Corporation of the City of Ottawa, as prohibited the selling or offering for sale of any fresh fish in the said city elsewhere than in such places as should be allotted and designated by the standing committee on public markets as fish markets, being section 1 of Article IX. of said by-law, with costs to be paid by the said corporation to the said Borthwick, upon the following among other grounds:

1. The said provision of the said by-law is *ultra vires* of the said Municipal Corporation.

2. The said provision is an attempt not only to regulate but to fix the place of sale of the commodity mentioned therein, and the said corporation has no such power under the provisions of the Municipal Acts in force in this Province.

3. The said provision is inconsistent with a subsequent provision in the said by-law, viz.: section 1 of Article X. thereof, and the same ought not therefore to be enforced or allowed to remain as a provision of the said by-law.

4. The said corporation having passed section 1 of Article X. of the said by-law under the authority of the Municipal Act, 46 Vic. ch. 18, sec. 498, O., the earlier provision of the said by-law against which this motion is made was such a provision as is by the said Act expressly excepted from the powers of the said corporation when and so long as the said section 1 of Article X. of said by-law shall remain in force.

5. Even assuming that sub-sec. 5 of sec. 503 of the said Act authorizes the corporation to fix the place of sale of the commodity in question, it only authorizes the same when the commodity is exposed for sale; and the provision complained of is therefore too wide.

6. The powers given by said section 503 are expressly subject to the restrictions and exceptions contained in section 500 of the said Act, and the provision complained of is in excess of the said powers as restricted by said section 500.

On March 10th, 1885, the motion was argued.

Shepley, in support of the motion.

MacLennan, Q.C., contra.

March 17, 1885. ROSE, J.—This is a motion to quash section 1 of Article IX. of by-law No. 588 of the city of Ottawa.

The section in question is as follows:

" Article IX.

" Fish Markets.

" Sec. 1. On and after this by-law taking effect, no person or persons shall sell or offer for sale any fresh fish elsewhere than in such places as shall be allotted and designated by the standing committee on public markets as fish markets in any of the aforesaid markets."

With this section must be read section 1 of Article X., as follows :—

" From and after the passing of this by-law, it shall and may be lawful for the vendors of any articles in respect of which a market fee may, under the Municipal Act be lawfully imposed without paying market fees, to offer for sale and sell or otherwise dispose of, any such articles at any place within the city of Ottawa, excepting only at and upon any of the market places of the said city of Ottawa."

The whole by-law is a consolidation of previously existing by-laws with amending and repealing clauses.

The by-law sets apart certain sections of the city of Ottawa as markets or market places—six in number. It appears to have been the intention of the by-law that market buildings with stalls, &c., should or might be erected in the market places.

Four of these sections are called meat, fish, and produce markets, although in the enumeration of the articles for the sale of which the markets were established fish are not named.

By section 5 of Article IV. it is provided that " all produce, provisions, or articles of any kind brought to any of the said meat, fish, or produce markets, and exposed for sale, shall be placed in boxes, barrels, bags, or baskets, and *shall be exposed in carts or other vehicles which shall be placed upon said markets under the direction of the market inspector or such other officer or his assistants.* Any person or persons refusing to comply with this regulation, or refusing to remove such vehicles, boxes, &c., after selling their contents, shall be subject to the penalty hereinafter imposed by this by-law ; and shall also be liable to expulsion from the market."

This section uses language wide enough to regulate the sale of fresh fish as an article brought to the fish markets,

and provides for allotting places to the vendors who are to expose their wares in carts, etc., and place them under the direction of the market inspector.

By section 2 of Article VI. persons receiving "a lease of any of the stalls for the sale of fresh meat, fresh fish, or other produce in any of the markets established or hereafter to be established in said city, shall keep his or her shop or stall in a clean and proper state," &c.

When this section was passed it seems to have been contemplated that fresh fish would be exposed for sale in stalls. It is not said whether the provisions of sec. 5 of Article IV. were also to be followed and the "produce" placed in barrels, bags or baskets and exposed in carts or other vehicles placed in the stalls.

By sec. 9 of Article VI. fish dealers desirous of leasing a shop or stall for the cutting up or exposing for sale fresh fish, shall procure from the market inspector a certificate setting forth the number of the shop or stall and the price to be paid therefor.

When this section was passed it seems to have been thought that fish dealers would find it necessary to cut up as well as expose the fish they had for sale.

This would be inconvenient if the fish were to be exposed in carts or vehicles. The clauses may possibly be harmonized in some measure if we suggest that sec. 5 of Article IV. was intended to regulate vendors of fish who exposed their wares outside the market building, but in the market place; in which case they were required to occupy such places with their carts or other vehicles as might be assigned to them, and to expose their wares in such carts or vehicles; and that sections 2 and 9 regulated the use of shops or stalls inside the market building.

We then come to Article IX. which from its caption would seem to have been passed to regulate fish markets. When, in order of time, this was passed does not appear; but section 1, above quoted, would seem to have been passed to compel all persons desirous of selling fresh fish to resort to the fish market. Where or what were fish

markets nowhere expressly appears. As I have pointed out four market places were established, called meat, fish, and produce markets, but it was not said they were provided for the sale of fish; on the contrary, while naming many articles, fish are not named. The words are "for the sale thereon respectively of all kinds of meat, vegetables, grain, fruit, game, poultry, roots, fodder, wood, dairy products, eggs, and all other farm produce of every description usually brought to and sold in public markets."

From the closing words of section 1 Mr. Maclellan was enabled to argue that there were fish markets established in the general markets, *i.e.*, that a portion of the market—whether of the market places or buildings does not appear—was set aside expressly for the sale of fish.

This may be the fact, but otherwise than from these words it does not appear.

Mr. Maclellan thereupon further argued that the word "elsewhere" meant not elsewhere than in the market places, *i. e.*, that all persons selling fish in the market places must not sell elsewhere than in such places as may be allotted to them in the fish markets which are established in the market places. He thus sought to render sensible this section when read with sec. 1 of Article X. which expressly allows sale of fresh fish, &c., in all places outside of the market, free from payment of any fees.

If sec. 1 of Article IX. means, as Mr. Shepley contends, that no one shall sell fish elsewhere in the city of Ottawa than in the fish market, it is clearly illegal, as contrary to the provisions of secs. 498 and 500 of the Municipal Act of 1883, and inconsistent with sec. 1 of Article X.

It is my duty to support the by-law if possible. Mr. *Dillon*, in his work on Municipal Corporations, 2nd ed., sec. 353, says: "Thus, if by one construction an ordinance will be valid, and by another void, the Courts will, if possible, adopt the former."

If, as a matter of fact, the Municipal authorities have set apart a certain portion of the market places for the sale of fish exclusively, and have provided in such por-

tions, not only standing places for carts and other vehicles, but also shops or stalls, then the provisions may be read as follows, viz., that if the vendors expose their wares in carts, &c., they must stand where placed: that if they desire shops or stalls they must obey the regulations as to such shops or stalls; and that in no case must they sell or offer for sale fresh fish elsewhere in the market places than in the allotted places; but that no restriction is placed upon selling outside of the market places.

I will require to be informed as to the facts before making any order on this motion.

Since writing the above, counsel have furnished me with an affidavit made by the market inspector from which it appears that many years ago certain stalls in each market were set apart as fish markets, and that no application was ever made for standing room for carts or other vehicles from which to sell fish, and no provision made by the Council for so bringing fresh fish to the market.

It would thus seem that sec. 5 of Article IV. was not passed with reference to fresh fish, although wide enough in its language to cover them. The by-law may then be read as saying, "you may sell fresh fish in stalls and no where else in the markets, but outside of the market no restriction is placed upon your selling."

With much doubt I yield to this reading, as otherwise it is impossible to harmonize sec. 1 of Articles IX. and X.

The result is, that if the applicant has been fined for selling outside of the market he has been wrongly dealt with. I, of course, have nothing to do with the conviction on this motion.

The motion must be refused. I cannot give costs, as I think the language of the by-law invited the application.

Order.—Motion dismissed, without costs.

I may note that this is the first application made *on notice* to quash a by-law. Mr. MacLennan stated that he did not desire to raise the objection that it should be by order *nisi*. I am not to be taken as expressing any opinion in favor of such practice by making the order.

In *Hewison v. Corporation of Pembroke*, 6 O. R. 171, on Mr. MacLennan's motion I held that motion by order *nisi* was the proper practice.

Motion dismissed.

[COMMON PLEA DIVISION.]

THE ROYAL INSURANCE COMPANY V. BYERS.

Insurance—Misrepresentation as to net loss—Action for—Deceit—Amendment—Statutory Conditions—Evidence.

Action to recover from defendant a sum of money paid him in settlement of a loss by fire on a stock of goods, by reason, as was urged, of a misrepresentation as to the value of such stock at a date prior to the fire. The statement of claim alleged that defendant had falsely and fraudulently represented his net loss to be the amount so paid, whereby the plaintiffs were induced to pay the same; and that defendant falsely and fraudulently represented that at the date prior to the fire his stock on hand was of a certain value, whereas it was of a much less value; and that it was on the basis of such value that the calculation was made as to the amount of such net loss; also setting up the statutory conditions whereby, as alleged, the claim was vitiated for fraud and false swearing as to the amount of the loss.

Held, on the issue as raised, the plaintiffs must fail, for the issue was as to the amount of the net loss which the evidence shewed had been misrepresented; and also that there would be no recovery on the record as framed, for—plaintiffs having accepted a surrender of the policy—they had not offered to, and possibly could not, place defendant in his original position: that no amendment would avail, for to maintain an action of deceit not only must there be misrepresentation, but it must be to the damage of the plaintiffs, which the evidence failed to shew: that the statutory conditions could hardly be invoked, for no proofs of loss had been required; but, even if invoked, they would afford no defence, as there was no misrepresentation as to the amount of loss.

Held, also, that the misrepresentation, even as urged, was immaterial, for it being as to the value of the stock at the named date, the fact of its causing an erroneous calculation upon which the amount of the loss was based, would make no difference so long as it was shewn that the loss itself was within the true amount; and also the plaintiffs were estopped from setting it up as the evidence shewed that they did not rely upon it, but on the knowledge acquired and independent information obtained by the plaintiffs' agent in the course of his investigation.

Seem, that on the evidence, as set out below, there was no misrepresentation at all.

THIS was an action brought to recover money paid by plaintiffs to the defendant in settlement of claim under an

insurance policy, the plaintiffs alleging misrepresentation and fraud by the defendant, which induced the plaintiffs to make the payment.

The action was tried before Galt, J., and a jury, at Belleville, at the Fall Assizes of 1884.

The learned Judge, on the answers to questions left by him to the jury, entered judgment for the defendant.

The facts fully appear in the judgment.

During Hilary Sittings the plaintiff obtained an order *nisi* to set aside the judgment, and to enter judgment for the plaintiffs for \$1,000, on the ground that the plaintiffs have overpaid the defendant at least that sum, and are entitled to a return of it; or for a new trial, on the ground that the findings of the jury are against law and evidence and the weight of evidence; and for misdirection on the part of the learned Judge, in this, that he told the jury that if they found that the defendant had sustained loss to the extent of \$3,600 they ought to find a verdict for the defendant, whereas he ought to have told them that if the first statement in the proof as to the stock on hand at the time of dissolution of Byers & Johnson was untrue to the knowledge of the defendant, the plaintiffs were entitled to recover back the whole sum paid, and also he should have told the jury that if the defendant knew at the time of putting in proofs of loss that \$5,400 was untrue, then the defendant was guilty of a fraud; and for misdirection in telling the jury that the figures in the proofs of loss were Munroe's, whereas he ought to have told them that they were adopted by the plaintiffs after having been prepared by Monroe from information furnished by the defendant; and because the learned Judge did not put the following question to the jury, viz.: Was the statement in the claim paper as to \$5,400 untrue to the knowledge of the defendant? and also for improper reception of evidence to shew that the defendant's loss exceeded the amount referred to in the proofs of claim.

During the same sittings, *Moss*, Q.C., and *Clute*, supported the order. The settlement was made with the defendant by the company on a false and fraudulent representation, as to value, and was such as could have constituted a good defence to an action, if one had been brought by the now defendant, on the policy. The plaintiffs have the same right now as they had when the money was paid over, and having been improperly paid over the plaintiff can now recover it back : *Queens Ins. Co. v. Devinney*, 25 Gr. 394 ; *British America Ins. Co. v. Wilkinson*, 23 Gr. 151 ; *Chapman v. Poole*, 22 L. T. N. S. 306 ; *Laidlaw v. London and Liverpool, &c., Ins. Co.*, 13 Gr. 377 ; *Brownlie v. Campbell*, 5 App. Cas. 925, 950 ; *Smith v. Hughes*, L. R. 6 Q. B. 597 ; *Kerr on Fraud*, 2nd ed., 5-7, 12, 60-1, 69 There was clearly misdirection as pointed out in the order *nisi*.

Britton, Q.C., and *Dickson*, Q.C., contra. [The Court intimated that they thought the motion must be dismissed. but as they intended giving a written judgment, they would take any cases the counsel might desire to refer to.] They accordingly referred to *Joliffe v. Baker*, 11 Q. B. D. 255 ; O. J. Act Rules 311, 321.

February 28, 1885. ROSE, J.—It will be convenient to see what case the plaintiffs make on their pleadings, and what on their evidence ; but before doing so I will briefly state the facts which led up to the litigation.

In 1876 the defendant, and one Henry Johnson, formed a partnership to carry on the business of general dealers in the Village of Consecon. This partnership continued until the 15th of May, 1880.

On the 29th of March, 1880, the firm of Byers & Johnson insured their stock in the plaintiffs' company for \$4,000. There is no suggestion of bad faith in the making of the contract. The goods were then represented to be of the value of about \$7,000.

n forming the partnership each put in \$2,000.

When the dissolution took place the assets consisted of stock, book debts, and shop fixtures.

The stock was worth, at invoice prices, over	\$4,000 00
The book debts about.....	4,868 00
And the shop fixtures about	87 00

Total	\$8,955 00
The liabilities	5,745 00

Shewing a surplus of about.. \$3,210 00

By the terms of the dissolution:

The book debts were valued at 65c. on the \$.	\$3,164 00
The stock \$3,302 at 70c.....	2,311 00
814 at 50c.....	407 00
Fixtures	87 00
	<hr/>
	\$5,969 00

It was agreed that Johnson should assume the liabilities, *i. e.* 5,745 00

Taking the book debts \$3,164 00

And receiving from Byers 2,872 00

\$6,036 00

Thus giving to Johnson about \$291 00

The \$2,872 represented the value of the stock and shop fixtures as above.

It follows, therefore, that as Byers only had the stock and fixtures, either there must have been a large margin in value over and above the 70c. and 50c., or he would be paying Johnson \$291, and sinking all his own capital.

This is explained by Johnson, who in his evidence states that the stock of goods amounted in value to \$4,000, and was worth perhaps 100 cents in the \$ to any one going into the business.

As Johnson was called by the plaintiffs, and made this statement in examination in chief, I take it as an admitted fact.

Deducting from.....	\$4,000 00
The amount paid by Byers to Johnson	2,872 00
	<hr/>
Leaves	\$1,128 00

As the amount Byers was receiving on account of the \$2,000 paid by him into the partnership, Johnson said these several amounts were respectively charged up to the private accounts, and the result shewed a balance coming to Byers of \$87.59, which he had to pay him.

The above statement of account I have drawn from the evidence.

It is apparently only approximate, but it is, I think, sufficiently accurate to serve the purpose of ascertaining the relative positions of the partners at the date of dissolution, and to shew that the \$2,719.07 paid for the stock by Byers did not represent its real value for the purpose of carrying on his business.

In March of 1881, the fire occurred, and the loss was substantially total. One Duncan Monroe, agent and inspector of the plaintiff's company, at once went to Consecon.

He found much excitement in the village, and rumours that the defendant had set fire to the building.

Upon investigation he concluded that such a charge was not sustainable; and entered upon negotiations for an adjustment or settlement.

The stock-book was burnt, but he obtained all the other books and papers, and spent much time in looking them over for the purpose of ascertaining the amount of goods on hand at the time of the fire, and which were destroyed.

His starting point was the amount of stock on hand at the time of the dissolution with Johnson, which he fixed at\$5,438 14

Subsequent purchases 3,770 95

9,209 09

Less sales 4,502 96

Salvage 16 00

Goods taken out of store for private

use 17 40

Allowed for deterioration 1,017 98 5,554 34

Making the net loss\$3,654 75

which he induced the defendant to accept on promise of an immediate payment. Upon advising the company this sum was forthwith paid.

The plaintiffs obtained from one Waddell, a clerk with the defendant, a statutory declaration, that the stock in hand at time of dissolution was worth in cash \$5,438.14, "as valued by himself and former partner in business Mr. Johnson." This declaration is in the handwriting of Mr. Monroe.

He also filled up a statutory declaration on a printed form furnished by the company, containing the following clause :

"Said property was destroyed by fire at or about three o'clock, a.m., on the 9th day of March, 1881, to the amount of \$3,654.75, caused by means to me unknown," &c.

At the foot of this declaration was a receipt under seal, signed by the defendant for the \$3,654.75, in consideration whereof the defendant surrendered the policy and covenanted to hold and keep harmless the company from the claim of any person whatsoever under said policy in respect of said loss.

On the back of the declaration was an award signed by the said Johnson acting for the company, and one R. T. Osborne acting for the defendant, which is as follows :

"Having carefully examined the details of the loss within indicated, we have impartially and conscientiously awarded the assured the sum of \$3,654.75, in full for said loss, and recommend payment be made upon this basis, viz: On item No. 1, insured \$4,000, awarded \$3,654.75. Underneath was written: "I accept this award as the basis of settlement with the Royal Insurance Company." (Signed) "John Byers. March 11th, 1881." Underneath this was a statement of "Details of Loss," being substantially as I have set it out above, and shewing "Amount of net loss, \$3,654.75." (Signed) "John Byers."

It is now alleged that the first item largely exceeds the real value, and should in fact have been only \$2,719.07, and that the defendant falsely and fraudulently represented it to be the true amount of stock on hand at the time of dissolution.

The statement of claim, paragraph 4, is as follows:

"On the 9th day of March, 1881, the said stock of goods, so insured by the plaintiff, was almost totally destroyed by fire, and thereupon the defendant falsely and fraudulently represented to the plaintiffs *that he had suffered a net loss of \$3,654.75*, and gave a detailed statement of the same in the words and figures following," setting out statement substantially as above.

Paragraph 5 is as follows: "The plaintiffs upon such false and fraudulent statement were induced to and did pay the defendant on the 12th day of March, 1881, the said sum of \$3,654.75, in liquidation of said supposed loss."

It will be observed that what is so far complained of is the false and fraudulent representation that the defendant had suffered a net loss of \$3,654.75.

The paragraph proceeds "And in order to induce the plaintiffs to pay his alleged loss, the defendant falsely and fraudulently represented that the stock on hand on the 15th May, 1880, (the day following the purchase from Byers & Johnson) was the sum of \$5,438.14, and that it was upon the basis of that valuation that he had bought the same from Byers & Johnson, whereas the fact is that the defendant had purchased the same as aforesaid upon a total valuation of \$2,806.22, *and which represented the true and full amount of stock on hand on the 15th of May, 1880.*"

Having regard to the statement that the payment was made relying on the false representation as to the net loss, and the words above italicised, it would seem that the plaintiffs are only complaining that they have been induced to pay more than the net loss.

Paragraph 7 of the statement of claim sets out statutory condition 11, sub-clause 2, and sub-clause 15, providing that all fraud and false swearing in relation to the amount of the loss shall vitiate the claim; and charges fraud and false swearing.

The only fraud, so far spoken of is, if I am correct in my view of the pleading, the fraud representing the net

loss at \$3,538. The claim is, "to have it declared that said payment of \$3,654.75 was induced by the fraud of the defendant, and was by mistake, and in misapprehension of the true facts.

2. That defendant's fraud and false statement vitiated the policy, and to have the same declared void.

3. To be paid by defendant the said sum of \$3,654.75 and costs of this suit."

There is no allegation of the plaintiffs having offered to give the policy back to the defendant, or of any steps to replace him in his original position.

Now what is the evidence to support the charge?

Monroe says, p. 1: "He told me what his stock was at the dissolution * * I am not very sure that he gave me the exact figures then, but it was somewhere over \$5,000;" p. 2. "He said the stock when they dissolved was worth \$5,438.14, supported by his clerk, Mr. Waddell." "Q. Then what did you take as the starting point to adjust the loss? A. That amount * * I do not think there was any statement in his book shewing what the stock was at the dissolution." This is afterwards shewn to be untrue. "Q. So you had to rely on his statement as to that? A. Yes and try and corroborate it. Q. Corroborate it by his clerk? A. Yes, and also by Johnson."

On p. 5 he admits getting from Johnson a slip of paper shewing the amount of goods charged at the time of dissolution, shewing about \$2,700 in round numbers; also that in arriving at an estimate of the loss he took the goods at their invoice prices, and made a deduction for deterioration.

He admits, p. 7, shewing defendant the slip of paper he got from Johnson, and that defendant and he had a discussion about it; on p. 8, that he made "a calculation or a figuring, starting with a basis of \$2,700," and that before he left Consec he ascertained that the defendant had sustained a loss to the extent that he claimed. On p. 9, "Q. You did make up a statement on the basis of \$2,700 as the first element in the factor? A. I am not positive about that. I know I made up a statement and we had some discussion

about it. I seemed to think that \$2,700 and something, was the actual value of the stock. He said that was what he paid Johnson for it, for his share, for his half of the stock.

Q. Is it half of the stock, or half of the business? A. Half of the stock; and he said 'the other half was mine.'

Q. The other half of the stock, or the other half of the business? A. The stock; it was the stock we were talking about. Q. Who was it suggested doubling the \$2,700?

A. *Well, if that is what he paid Johnson for his half of the stock it would necessarily have to be doubled.* Q. And you would see it at once? A. Yes."

This seems to me most important evidence in the light of the evidence of Johnson to which I will shortly refer. On the same page we find that he was aware there was in the village a feeling of hostility to the defendant, and for that reason he was put upon his guard, and was more particular than he otherwise might have been.

It also appears that defendant objected to the deduction for deterioration, and strongly to accepting \$3,650, and was induced to accept the offer of the amount paid on the promise of getting the money at once.

He states that the defendant relied on Waddell, his book-keeper, and who had been book-keeper for Byers & Johnson, as to the correctness of the figures, Waddell at the time of the fire being engaged in taking stock; and that Waddell informed him that at the time of the fire there was stock on hand to the amount in value of \$4,800.

He admits, what is evident, that if this statement was correct, the defendant suffered loss to that or nearly that amount.

He admits, that the obtaining the award was at his (Monroe's) instance: that defendant had nothing to do with it; and that Johnson was appointed on behalf of the company because he was in a position to shew the correctness of the first item in the statement. Also, that prior to settling he obtained from Mr. Johnson a statement of what appeared in the books of Byers & Johnson as to the value placed upon the stock, which was as follows:

" STOCK.

" 3,302 49 at 70c.	\$2,311 40
" C. & B. stock at 50c.....	407 67
" Shop fixtures.....	87 15

" Total stock \$2,806 22

" On hand at dissolution as charged to private account of J. Byers."

He explained that "C. & B." meant Cadman & Byer's stock, *i. e.*, stock held by a firm of Cadman and defendant prior to formation of the firm of Byers & Johnson.

He states that at the time he got the memorandum he thought it represented that was all the stock on hand at the time of the dissolution, but that the defendant convinced him it was only the half of it.

It will be remembered that this conviction was induced by the defendant saying that \$2,719.07 was what he paid Johnson for his share of the stock.

He also admits that he learned from the memorandum that the invoice price of the goods charged to defendant at time of the dissolution was \$4,117.83.

Johnson was called, as I have said, by the plaintiffs. In examination-in-chief, in answer to a question by the learned Judge, he stated that the defendant received goods to a larger amount than \$2,700, *i. e.*, to the amount of \$4,000 and over on the original cost.

Mr. Bethune asked: "You dissolved on the basis of \$2,700, didn't you? A. Yes, that was the ratio the stock was to bear to the book debts \$2,719.07. That was the net value at 60 cents and 70 cents in the dollar * * The stock was worth perhaps 100 cents in the dollar to any one going into the business.

"Q. What was the gross amount of the stock? A. Somewhere about \$4,000.

"Q. He was to pay out of that \$2,800? A. I do not know as he was to pay out of that. He was to pay me; but that was a separate thing.

"Q. How a separate thing? A. We had to adjust our accounts. Each of our private accounts shewed a debit of \$3,700 and some odd. I had to pay Mr. Byers \$87.59 * * I could not say it," *i. e.* \$2,700 "was the cash value. * * I say it was the basis on which we dissolved partnership. I would not take the book debts at 100 cents on the dollar.

"Q. Then you must have thought that the goods would produce \$2,700, and odd in cash? A. I should think they would produce that, and a great deal more.

"Q. Do you mean to say that was not cash value? A. I would not like to say anything about its being the cash value."

It seems plain upon this evidence that the sum of \$2,719.07 was not considered the cash value of the goods, and any calculation to arrive at the loss by the fire, commencing with an item of \$2,719.07 would have been so manifestly unjust that one cannot wonder at defendant's protesting against it, or at Monroe yielding to such protest.

I am at a loss to see how any one, Judge or jury, can be asked to credit the assertion that Munroe for a moment believed that \$2,719.07 represented the value of the goods at the time of dissolution.

He easily ascertained what was the exact sum at which they were charged to defendant. He also was fully informed as to what was their invoice price. What was their actual value to defendant in the business was a matter of *opinion* merely; and, according to his own evidence, he was content to accept the statement of defendant as to its value.

Now comes a most important piece of evidence read in the light of *Redgrave v. Hurd*, 20 Ch. D. 1, at p. 21, where it is said by Jessel, Master of the Rolls: "In order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shewn either *that he had knowledge of the facts contrary to the representation*, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation."

On cross-examination the following appears :

"Q. How did you come to see him? A. Mr. Monroe came to see me and said Mr. Byers had informed him the stock book had been burned, and they could not arrive at the amount of stock on hand, and Mr. Monroe came to me for the figures. Q. Did you give him the figures? A. I did; I opened up the book and shewed him those very figures. Q. Did you tell Mr. Byers that you were going to do it, or did you let him know you were going to give it? A. No. Q. Mr. Byers had nothing to do with it? A. No, Mr. Byers and I had not spoken for four months; we were not on friendly terms. Q. Monroe admitted that he knew this fact before he went to Johnson, so that if there was anything misleading in those statements Mr. Byers was not responsible for it? A. No. Q. Was Mr. Byers responsible for any information you gave Mr. Monroe? A. Not at all. Q. You did it of your own motion? A. Yes, as an accommodation to Mr. Monroe. * * Q. Did you give any memoranda of figures to Mr. Monroe? A. I think I did. I won't be positive about it, *but I certainly shewed him the ledger.* He took the figures, or I gave them to him. *He asked me at the time if I considered that a fair cash value for the stock.* I said, well it is a very difficult question. That is the basis on which we dissolved. Q. Do you say that in telling anything to Mr. Monroe you had from first to last no communication with Mr. Byers? A. I had no communication whatever with Mr. Byers. Q. Then if that is the case Mr. Monroe *must have known that those figures that you shewed him from your book were all the stock that he got over from the old firm at the time of dissolution?* A. Yes, I gave him the figures, the net amount. *He saw the whole thing.*"

On re-examination,—“Q. In whose custody has that book always been since the dissolution? A. In mine. Q. Has it ever been in Mr. Byers possession? A. No.” I understand by this is meant the book (ledger) shewn to Monroe.

Here we have Monroe going to a former partner of the

defendant then on unfriendly terms, one in whose breast lay the full knowledge of the facts, in whose possession was the ledger in which was the account of the whole transaction, making full enquiries, examining the ledger, asking if the figures shewn him represented the cash value, being informed that was a difficult question, and so acting that Johnson states (without objection) that in his opinion he *must* have known that the figures shewn him were *all* the stock that he took over from the old firm at the time of the dissolution. "Yes, I gave him the figures, the net amount. He saw the whole thing."

How could the jury be directed that if they believed this, the evidence laid before them by the plaintiffs, they would be justified in finding that the plaintiffs had been led into making the settlement by misrepresentation of the defendant on which they relied, as to which they did not seek independent information upon which they relied; or in the words of the Master of the Rolls, that if such representation were made they had not knowledge of the facts contrary to the representation?

It seems clear from the evidence on the part of the plaintiffs, that such statement was not relied upon. What Monroe wanted to ascertain was the amount of the loss. He makes a calculation starting with an estimate. He deducts a very large sum for deterioration. He arrives at a result which he said himself he was convinced was within the amount of the loss. He induces the defendant by promise of immediate payment, and threat of litigation to accept such sum. He is anxious to have such settlement placed in form to lay before the directors in England, and he goes to Johnson and Osborne to certify to what? the accuracy of the items forming the basis upon which the result is founded? No, but the result itself as being within the amount of the loss.

Listen to the evidence of Johnson:

"Q. You signed the award without seeing the figures?
A. I wish to explain that. Mr. Monroe, after the settlement had been arrived at, * * walked into the office.

Mr. Byers came in with him. Mr. Monroe said: 'Mr. Byers and I have agreed upon a settlement.' Said he: 'it is customary with the company for the inspector to get a couple of business men in the place to sign the award, as it looks a little better going before the directors in the old country.' I said: 'Mr. Monroe I do not know anything about your settlement, and I do not feel justified in signing anything about it, but if you say that is what you and Mr. Byers have agreed upon without my taking any responsibility, I will sign it.' And Mr. Monroe said it was all right, and said: 'I will take the responsibility for it.' *The amount did not look to me to be out of the way.* The stock sometimes, when I was in the store, ran to \$6,000 or \$7,000."

Recollecting that only the day before Johnson had shewn Monroe the ledger; had given him full information; had told him the value to be placed upon the stock at the time of dissolution was a difficult question, it is manifest that what Johnson was asked to certify was that the amount agreed to be paid was within the amount of the loss.

Waddell, the book-keeper, was called on behalf of the plaintiffs. He stated that Mr. Byers did not ask him to misrepresent or conceal anything from Monroe, nor did he do so knowingly. "Q. When these men were together, and you were present, who actually did any of the figuring that was done? A. Mr. Monroe and myself. Q. Did you intend honestly to arrive at the loss? A. I did. Q. Was Mr. Monroe satisfied then with what was done? A. Yes. Q. How long had you been in the employ of Mr. Byers? A. I went with Byers & Johnson in October, 1876. * * Q. And you would know about the stock? A. Yes. * * Q. Were you, or were you not satisfied at the time Mr. Monroe was there that Mr. Byers had sustained a loss to the extent of \$3,600 and odd. A. I think he had."

The evidence offered on behalf of defendant I do not examine, treating the case on plaintiffs' own shewing.

The learned Judge left to the jury the following questions :

1. Did the plaintiffs overpay the defendant ?
2. If they did so, was the overpayment obtained by false and fraudulent representations of the defendant ?
3. If they were not, what was the amount of such overpayment ?

The jury answered the first question in the negative ; and accordingly, did not answer the remaining questions.

The learned Judge directed the jury, that if the defendant had sustained loss to the extent of \$3,654, he was entitled to their verdict, and that they might put the manner of making out the account to one side.

1. It seems to me, on the issue appearing on the record, this direction is right. That if the defendant did not misrepresent the amount of his net loss, the issue raised upon the record must be decided in his favor.

2. That the plaintiffs are not entitled to recover in this form of action. They have not offered to place defendant back in his original position, and possibly could not do so, that is—they have a surrender of the policy—if the policy were re-assigned, could the defendant perform the conditions necessary to enable him to prove his loss. See *Morrison v. Earls*, 5 O. R. 434, and cases there cited.

If the plaintiffs are left to rely upon an action for deceit, it is clear that not only must there be misrepresentation, but it must be to the loss of the party complaining. Here upon the evidence of the plaintiffs the defendant lost more than the amount of the insurance, and no defence to an action on the policy for such loss is suggested, save the reliance upon condition 11.

The learned Chief Justice pointed out on the argument that it was difficult for the plaintiffs to invoke the protection of that condition, in face of the fact shewing that no proofs were required under the policy. But admitting for the moment that such condition is available, what is the alleged fraud ? If I am not in error, it is the representation as to loss, and that is shewn not to have been mis-

represented. What is the false swearing? The statutory declaration is only as to the loss, and that is shewn not to be falsely stated.

3. I am moreover of the opinion that if there was a misrepresentation it was immaterial, What was sought to be ascertained was the amount of the loss. The calculation was merely a means to an end. It is shewn, and the jury have found, correctly, I have no shadow of doubt, that the loss was made to appear within the true amount. The misrepresentation as to the first item, if in fact it led to no error, cannot, it seems to me, have been material. Indeed it seems beyond argument that if the plaintiffs' present contention be correct, and the account be commenced with \$2,719, and a deduction of over \$1,000 be made for deterioration, the result would be that the loss would appear at less than \$1,000, when all the evidence shews it to have been at least \$4,000. Such a result would, without doubt, have been a fraud upon the defendant. The mere statement of it shews that the plaintiffs' contention is not well founded.

4. I am not convinced that there was any misrepresentation.

I have pointed out the mode of settlement arrived at when the dissolution took place.

It is manifest that the amount of \$2,719 was not intended to represent the value of the goods. What that value was, according to Johnson, was a difficult question.

The result arrived at by the partners was that Johnson should withdraw from the business, leave the defendant to carry it on, and that Johnson should receive his share from the business. Therefore, although possibly an inaccurate mode of statement, I do not think it an untruthful statement to make, that what the defendant paid Johnson was for his interest in the stock, and especially so, when we remember that Monroe had, as defendant knew, knowledge not only of the actual amount paid, but also the invoice cost of the goods. As Monroe admits, when the defendant stated that \$2,719 could not be correct, that he

had paid that to Johnson for his share, he himself at once jumped to the conclusion that double that amount would be—not what was paid, not the invoice price—but the value of the goods then in stock. The words in the statement are: “amount of stock in hand, May 15, 1880.”

I do not understand that the value of goods to be recovered from an insurance company is necessarily, either the actual cost to the insured or the original invoice price, unless the contract in terms say so. These may, or may not, represent the true value. The value may be more or less. The value must be a matter of opinion. In this case Monroe was in as good a position to judge of the value as the defendant, he having the actual cost to the defendant, and the invoice price.

I have endeavored to shew that on this record the plaintiffs must fail; and for the reasons given I am of the opinion an amendment would not avail anything.

In my opinion the order *nisi* must be discharged, with costs.

CAMERON, C. J., and GALT, J., concurred.

Order nisi discharged.

[COMMON PLEAS DIVISION.]

MAHONEY V. MACDONELL ET AL.

Trial—Evidence—Exclusion of witnesses.

At the beginning of a trial all witnesses were ordered out of Court, except the parties to the action. Judgment having been given dismissing the action as against the defendant P., his co-defendant M. entered upon his case and called P. as a witness. P. had remained in Court and heard the whole of the evidence adduced by the plaintiff, and his evidence was rejected on this ground.

Held, that the evidence of P. was improperly rejected, and a new trial was ordered.

THIS was an action for the price of goods sold, which was tried at the Cornwall Spring Assizes, 1885, before O'Connor, J.

At the beginning of the trial the witnesses for both parties had been ordered out of Court, but the parties to the action had not themselves been required to retire.

At the conclusion of the plaintiff's case the learned Judge gave judgment dismissing the action as against the defendant Patterson only.

The defendant Macdonell then entered upon his defence, and called as his first witness his co-defendant, Patterson, who had, as a party to the action, remained in Court, and heard the whole of the evidence adduced by the plaintiff.

The plaintiff objected to Patterson being allowed to give evidence, on the ground that he had remained in Court after the order for the exclusion of all witnesses. The learned Judge gave effect to the objection, and rejected the evidence of Patterson. The trial proceeded, and judgment was given for the plaintiff as against the defendant Macdonell.

On the 20th May, 1885, *Aylesworth* obtained an order *nisi* to set aside the judgment against the defendant Macdonell, and for a new trial, on the ground of the improper rejection of Patterson's evidence.

During the same sittings, *Aylesworth* supported the order, and cited *Chandler v. Horne*, 2 Moo. & R. 423; *Cobbett v. Hudson*, 1 E. & B. 11; *Davis v. Farmers' Mutual Ins. Co.*, 39 U. C. R. 452.

Cattanach, shewed cause, and referred to R. S. O. ch. 50, sec. 260.

May 30, 1885. THE COURT made the order absolute, with costs to be costs in the cause to the defendant Macdonell, holding that the evidence of Patterson on behalf of his co-defendant had been improperly rejected at the trial.

Order absolute.

[CHANCERY DIVISION.]

MITCHELL V. GORMLEY.

Partnership—Syndicate—Right of one partner to deal with his share—Profits.

M. & G. met and agreed to jointly purchase 150 acres of land and to sell it in lots, or perhaps *en bloc*, to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. M. had one-third interest and G. had two-thirds. No syndicate was got up to take the whole, and G. telegraphed M. that he was going to arrange a syndicate for two-thirds, and he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds interest, and obtained a large profit thereon. This arrangement was made in writing, and recited that G. was seized in fee of the lands, and had executed a declaration of trust of one-third in favour of M., and "executes this declaration as to the remaining two-thirds." A quit claim deed was afterwards executed by M. in favour of G., and a declaration of trust as to one-third in favour of M., was signed by G. In an action by M. for a share of G.'s profit, it was

Held, that there was no sale of any of the lots that belonged to M. The two-thirds had not been disposed of so as to pass out of the partnership, though as to them there might be a sub-partnership; there had been no dealing with the joint property of the partnership, but only of the individual interest of one partner; he had sold some portion of his individual share and no injury had resulted to his partner, and even if any had it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern. The action was therefore dismissed, with costs.

THIS was an action brought by John E. Mitchell against James Gormley to recover a share of the profit made by the defendant on a sale of lands, in which the plaintiff contended he was interested, as a partner.

The statement of claim set up that the plaintiff and defendant had purchased certain lands which were conveyed to them jointly: that subsequently the plaintiff, at the request of the defendant, granted and conveyed to the defendant all his interest in said lands, and thereupon the defendant executed and delivered to plaintiff a declaration of trust in respect of plaintiff's interest in said lands which said declaration was in the words and figures following:

"This Indenture, made this fourteenth day of April, 1882, between James Gormley, of the City of Toronto, Esquire, of the first part, and John E. Mitchell, of the said City of Toronto, Esquire, of the second part.

Whereas, by a deed bearing date the twentieth day of February last past, the lands hereinafter mentioned were conveyed to the parties hereto jointly.

And whereas, the said party hereto of the second part, has by deed bearing even date herewith granted and quitted claim all his estate and interest therein to enable the said party of the first part to sell and convey the said lands to the purchasers of the lots into which the said lands have been sub-divided on a plan which has been duly registered.

And whereas, the said parties hereto have desired this deed to be executed to declare their respective estates, rights, and interests therein and thereto.

Now this indenture witnesseth, that in consideration of the premises he the said party of the first part doth hereby declare that the said party of the second part is entitled to an undivided one-third interest in and to all and singular, those certain parcels, etc., (describing them) and to the same interest in the proceeds arising from the sale of the said lands or of any part or parts thereof, and that he will stand possessed of all such moneys in the proportion of one-third thereof for the said party of the second part, his heirs or assigns, less the one-third share of the mortgage made by the said parties hereto securing a portion of the purchase money and interest, and less also the one-third of the legal and other proper and necessary expenses in carrying out the sale of the said lands as intended and agreed upon, and that he will pay such one-third surplus moneys to the said party of the second part, or to such other persons or corporations as he may from time to time appoint, and the said party of the first part covenants to and with the said party of the second part his heirs and assigns that he will not sell and convey the said lands for a less sum than \$60,000 without first obtaining the consent in writing of the said party of the second part his heirs and assigns for such purpose.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above mentioned.

(Signed) J. GORMLEY. [L. S.]

Signed, sealed, and delivered
before and in presence of

(Signed) C. E. ARMSTRONG.

That the defendant had sold a large portion of the said lands, and after paying all expenses there was a surplus in which the plaintiff was entitled to share: that the defendant had refused to account for the same: that the plaintiff and defendant had purchased the said lands with a view to re-selling at a profit in the proportions of one-third and two-thirds respectively, and all expenses, such as surveys, &c., as well as profits, were to be divided in the same proportions: that it was agreed between them that

they should each try to procure other parties to take an interest at an advanced price, and that all sums paid by such other parties for such interests should be divided in the same proportion : that the defendant after that agreement procured seven others to take interests, for which each of the seven was to pay \$5,000 : that after he had secretly done so he requested the plaintiff to convey all his interest in the property to defendant, alleging that he required such conveyance to enable him to deal with the property, and the plaintiff made the conveyance and received the declaration of trust referred to in the belief that the defendant was acting and would act for the common interest : and asked for an account and payment of the plaintiff's share of the profits.

The statement of defence set up that defendant was interested with the plaintiff in the lands, and that both tried to sell them, and the defendant accepted a proposal as to his two-thirds interest whereby seven other parties became equally interested with him in his two-thirds interest, and submitted that they were necessary parties to the action : that the plaintiff refused to join in this partnership or syndicate, and refused to transfer his one-third interest, and determined to retain his interest separate : that the defendant still holds the one-third for the benefit of the plaintiff, and was willing to transfer it at any time upon payment of the proper charges against it.

The action was tried at the Spring Sittings held at Toronto on May 8th, 1885, before Boyd, C.

The evidence seemed to show that the plaintiff and defendant had met in Winnipeg, and agreed to purchase the lands in question between them in the proportion of one-third to the plaintiff and two-thirds to the defendant, with a view to dividing it up in lots or selling in *en bloc* at a profit. The defendant then left Winnipeg for Toronto, and the following correspondence passed between him and the plaintiff, who had remained in Winnipeg for the purpose of selling at a profit if possible.

(Telegram—Mitchell to Gormley.)

WINNIPEG, MAN., 20th February, 1882.

What price will I make lots outer two miles? What price for whole property?

(Answer.)

TORONTO, 21st February, 1882.

Sell outer lots as you please. Whole property should bring about sixty thousand dollars. Will be satisfied with anything you do. All my interest cash.

(Letter—Mitchell to Gormley.)

WINNIPEG, Sunday.

Since you left for Toronto. * * * The property I have had subdivided all through into 33 foot lots. They will sell better that way I think, and the whole makes nearly eleven hundred and fifty lots. I am going to try and get up a syndicate to buy the whole at \$450 an acre. It will pay us better if we can sell it all in bulk instead of peddling out the whole in lots. I want to see the whole sold out before the spring sets in. Do you think you can sell any of the property to good advantage in Toronto? If you can you can arrange for a sale, and I will send you the plans. * * * I will order one of the large plans made out on paper for auction purposes, and can send it to you if you wish. If you think you can sell the property well in Toronto, you might arrange a sale and telegraph me; but I think I would rather be inclined to sell in block, there will be much less bother that way. I hope you have sent your funds by the time you receive this letter, as Fawcett has been bothering me. The title being all right I gave him my cheque for \$5,000 last Friday to keep him quiet.

(From Gormley to Mitchell.)

TORONTO, 2nd March, 1882.

Your favour of Sunday duly to hand. I telegraphed to Mr. Wm. H. Best on Monday last the funds to make up the balance due on the two-third of the cash payment. I suppose he has received and paid it over ere this. Your proposition to sell all out at once at \$450 per acre would be perfectly satisfactory to me. If we are to sell it off retail, it is very important that we should make an immediate start. It seems to me that we would probably find better sale for the greater part of the lots here. If you don't carry out the proposed arrangement it would be well to forward the plans immediately on completion, so that we can strike while the iron is hot.

(From Mitchell to Gormley.)

WINNIPEG, 6th March, 1882.

We duly received your funds, have completed the cash payment, and have the deeds and mortgages registered. I am having a large plan made of the property, it will be 14 feet long by about 4 feet wide, and will make a good display. I have had a lot of trouble to get it made, but think when you see it you will be pleased. * * * In the meantime I

am trying to get some syndicate to buy the whole property ; it will be much less trouble to us. I am offering it at \$450 per acre, at which price it will pay us well. The difficulty in selling by single lots or blocks will be the arranging terms, as it will be hard to get parties to pay all cash in order that we may release the property sold. * * * Can you sell any of the property down in Toronto? I think, perhaps, we could dispose of the outer two miles to better advantage down in Toronto than here. An average of \$65 per lot all through will pay us well. What do you think, providing I cannot arrange the syndicate ? I wish you were here, because I do not like to take all the responsibility on myself.

(From Gormley to Mitchell.)

TORONTO, March 10, 1882.

I have just received your letter, and in reply, would beg leave to state that in my opinion, if you could sell the property *en bloc* for \$450 an acre, or even \$400, it would be the best thing to do. Of course, you will do the best you can, and I shall be satisfied to carry out any arrangement you may make ; but I always prefer a quick sale if the returns be reasonable. If it cannot be sold in a lump, I think a part of it could be sold here, and you had better send down the plans as soon as possible, and try it there as well. If you intend having the outer two miles sold here, it would probably be well to get a plan made here of that portion of the lot, and not shew the whole plan * * * McGean, who was a part owner of the lot is in Ottawa now. He says the lot is worth \$60,000, and he thinks he could get a syndicate to buy it at that price. Do not hesitate to assume any responsibility in carrying out any sale you may make, as I will do no growling.

(From Gormley to Mitchell.)

WINNIPEG, 9th March, 1882.

I have gone over the prices of our different blocks in Kildonan, and think the blocks should bring as follows, viz : (giving numbers and prices) * but in selling it out in this way the expenses will be considerable, however, we will, in all probability, get an advance on these prices, so it will pay us for our trouble, although I would much prefer to sell all in a lump. In regard to the part to be sold in Toronto, I think the outer two miles will be the best * * I think they might be sold to much better advantage down there. It will not do to conflict in the selling here and there, so let me know what you think. In regard to terms, we will have to conform to the general rule here, and sell for half cash, the balance in six, and twelve months.

(Telegram—Mitchell to Gormley.)

WINNIPEG, March 11th, 1882.

What time on property to be sold per lot or block ? I propose half cash, balance six and twelve months.

(Answer.)

TORONTO, March 11th, 1882.

In block half cash, subject to existing mortgage. In lots half cash, balance on time to meet our payments.

(*Gormley to Best & Mitchell, Winnipeg.*)

TORONTO, 14th March, 1882.

Can you syndicate lot at sixty thousand? Will take half here. Answer.

(*Mitchell to Gormley.*)

WINNIPEG, 13th March, 1882.

I received your telegram in answer to mine of Saturday. I cannot see how we are to arrange the sale of lots on the terms you propose. All property here is sold one-half cash, the balance six and twelve months from the date of sale, one month of the time is gone already, and we could only allow five and twelve months time, provided we sold the whole property at once. We cannot do that if we have to sell in blocks, it may take a month or six weeks to do it in that way. I think we had better stick to the rule here and finance for our payments. If we are successful in our sales, the profit should run up so that by the time the last payment became due we could meet it out of the sales. In selling in blocks we might offer a discount for all cash. I am afraid there is very little chance to sell the property in one block, therefore, we had better try and sell it the best way we can. I hope to hear from you immediately on receipt of this, so that I may know how to proceed. You might send me a night message.

(*Telegram—Gormley to Mitchell.*)

TORONTO, 16th March, 1882.

Wills & Wilson willing to go with you in syndicating one-third. We will arrange two-thirds here.

(*Answer.*)

Don't care to be connected with syndicate as not knowing parties to it—rather close out. Will do my best to syndicate one-third here. Real estate dull.

(*Mitchell to Gormley.*)

WINNIPEG, March 20th, 1882.

I duly received your two telegrams, both of which I answered. I would much rather sell my whole interest than be bothered with syndicates. Have been trying as hard as I could to syndicate the other third interest but so far I have been unable to do so. Real estate here is very dull at present, but I am satisfied it will boom in a very short time. A joint-stock company has been formed to build a hotel on No. 14 Kildonan, which must do that property down there some good, so I don't think we are losing much in waiting. I have not offered the property in any other way than by the whole lump, as I have been waiting to hear from you in regard to the scale of prices I submitted to you a few days ago, and I don't know what you are doing with the property down there. If you have got your large plan made please send me the small one. McPhillip's people have lost the original plan, and as I want to get two other copies of the small plan, they want it to take a tracing of it. One of the copies I want to register. I got my large plan completed, it only cost \$45, and is as good as I was asked \$120 from McPhillips for. It is sixteen feet long by about four feet wide, and is the neatest plan I have seen. I wish you would send the plan as soon as you can, and answer my last letter in regard to what we are to do about selling, provided we cannot syndicate.

(Gormley to Mitchell.)

TORONTO, April 1st, 1882.

We are just making preparations to put the property in the market with (I believe) a good prospect of getting better prices than those mentioned in your letter. I will require a conveyance from you to enable me to deal with the property here, and I send you by Mr. Robinson a declaration of trust which will keep you all right in the matter. Please see Mr. Best and he will get me the documents and information I require and send them down. We have employed an agent here who has had large experience in selling Winnipeg property, and he has no fear of realizing prices far in advance of your expectations. Our plans and advertisement will be before the public next week, and I have little fear of the result.

(Mitchell to Gormley.)

WINNIPEG, 8th April, 1882.

I am in receipt of your favour of the 1st inst. through Mr. Robinson. Mr. Best is on his road to Toronto, so I had to get another lawyer to prepare the declaration of trust, so if you will kindly sign it and hand it to Mr. Lownsbrough, of the firm of Forbes & Lownsbrough, 30 King street east. He will wire and I will then send you the deed duly registered. In the meantime I will have all the papers and memorandums you require and sent to you. I hope you may be as successful in the selling of the property down in Toronto as you mention in your letter. I had one enquiry about the property a day or two ago, but the party has not come back again. I asked \$450 an acre for it, and half cash, balance in four and nine months. The Kildonan property owners had a meeting last week and one and all agreed to subscribe a fund for the purpose of employing a party to write up the property, and I feel confident that within a couple of weeks you will see Kildonan property booming, at the present time real estate up here is very quiet. I can send you a first-class large map of the property if you wish, if you want it telegraph me. Also you had better write me if you want the property withdrawn from this market, so that I will not be placed in a false position. I wish you would send me the small plan so that I can get it registered. I told you in my last letter to send it to me, as McPhillips had lost or mislaid the original, and as the one you got was the only copy, they are unable to give me another copy for the purpose of registration until they get your copy and take a tracing of it. I hope that in placing the property in your hands, as I am, that your expectations will be realized, as you know I am interested with other parties in the share held by me, and they place implicit confidence in what I do. I will write you again in a day or two. In the meantime I want a telegram from you.

P. S.—Mr. J. G. Robinson has seen the enclosed and approved of it.

(Telegram—Best to Mitchell.)

TORONTO, April 11, 1882.

Get papers from McGlashan at Brunswick and return deed to Gormley. Thinks he can sell here.

(*Gormley to Mitchell.*)

TORONTO, April 14th, 1882.

Some days ago I sent the declaration of trust (duly executed) to Mr. Best, but having crossed him on the way it was returned. I have, however, now signed and sent to Mr. Lownsbrough the one you forwarded. I herewith forward plan. It will be well to have the property written up as mentioned. When it is done let me have a few copies of the paper, it will be useful in selling. My letter to Mr. Best also enclosed a letter to you from Mr. Wills, consenting to the course of action. In the meantime hold for \$475 an acre "en bloc."

(*Mitchell to Gormley.*)

WINNIPEG, 19th April, 1882.

I am in receipt of your favour of the 14th inst., and in reply beg to hand you all the papers you have asked for, which you will please find enclosed. I will send you some of the papers which contain anything about Kildonan, it is being worked up at the present time. I have not received the plan, you say you enclosed yet, but suppose it is on the way. I will write you again in a few days; in the meantime I hope you may be successful in selling the property. I am holding "en bloc" at \$475.

(*Anderson to Mitchell.*)

TORONTO, May 4th, 1882.

Mr. Gormley has requested me, as secretary of the Kildonan Syndicate, to reply to your letter of the 30th April. We had a plan of the Kildonan property drawn and lithographed, and the outer two miles were placed in the hands of an agent here named Knott, who deals in Winnipeg property, and other lands in Manitoba and the North-West. He has advertised in the *Mail, Globe and Telegram*, and sent plans and price lists all over the country; but everything appears to be dull just now. Mr. Gormley received the assessment papers the other day, in which the property is valued at \$36,875. I enclose you a price list, and will forward one of the plans. The price list was framed by our agent, Mr. Knott, and may be modified to suit purchasers. I hope you will be successful in effecting some sales.

It was shewn in evidence that the defendant had in Toronto syndicated his two-third interest among seven other persons and himself in equal shares, at the sum of \$40,000, which arrangement was witnessed by the following agreement and deed.

We, the undersigned, hereby agree to form a syndicate for the purpose of purchasing two-thirds interest in lot number seven, in the Parish of Kildonan, adjoining the City of Winnipeg, in the Province of Manitoba, containing 151 acres, more or less, for the sum of \$40,000, one half to be paid in cash, and the remainder in two equal instalments at the end of

four months and eight months respectively, and we agree to take the shares of said property, and to pay the amounts set opposite our respective names.

Toronto, 21st M 1882.

(Signed)	D. Blain	one-eighth.....	\$5,000 00
"	A. McLean Howard ..	one-eighth.....	5,000 00
"	Wm. Anderson	one-eighth.....	5,000 00
"	J. Gormley	one-eighth.....	5,000 00
"	Columbus H. Greene..	one-eighth	5,000 00
"	John J. Cook	one-eighth.....	5,000 00
"	James Robinson	one-eighth.....	5,000 00
"	J. K. Macdonald	one-eighth.....	5,000 00

This Indenture made the 23rd day of March, 1882, between James Gormley, of the City of Toronto, in the Province of Ontario, in Canada, of the first part, and David Blain, William Anderson, Allan McLean Howard, John K. MacDonald, John J. Cook, and Columbus H. Greene, all of the City of Toronto, aforesaid, and James Robinson of the Village of Markham, in the County of York, of the second part. Whereas the party of the first part is seized in fee of the land and premises hereinafter mentioned, and has signed a declaration of trust in favour of one J. E. Mitchell, as to an undivided one-third part thereof, and executed this declaration as to the remaining two-thirds in consideration of the sum of \$40,000. And whereas the said parties of the first and second parts have each paid an equal amount of the said \$40,000, being \$5,000 each, and this indenture is executed for the purpose among other things of defining the interests of the parties hereto as to the said undivided two-thirds of all and singular those certain lands, tenements and hereditaments, in the Parish of Kildonan, adjoining the city of Winnipeg, in the Province of Manitoba, being composed of lot number seven in the said parish, containing one hundred and fifty-one acres, more or less. And whereas the said sum of \$40,000 was the money of the said parties hereto of the first and second parts in equal shares, i.e., each person having agreed to pay one-eighth share of the said \$40,000, and the said lands are held by the said James Gormley at the request and on behalf and for the benefit of each and all of the said eight parties of the first and second parts, so that each might be entitled to one-eighth share of the said undivided two-thirds. Now this Indenture witnesseth, and the said James Gormley doth hereby acknowledge and declare that the said sum of \$40,000 was raised by the said parties of the first and second parts as to the sum of \$27,000 thereof upon the security of their joint and several promissory notes payable three months from the 28th day of March, instant, at the Imperial Bank of Canada in Toronto, which included the part of the Bank interest for discounting the said note, subject to the two-thirds of a certain mortgage on the said lands to one Charles Livingstone for \$20,000, and that the said James Gormley stands seized of the said two-thirds in the said lands in trust for the said David Blain, William Anderson, Allan McLean Howard, John K. MacDonald, John J. Cook, Columbus H. Greene, and James Robinson, and the said James

Gormley their heirs and assigns as tenants in common, and for no other uses, trusts, and interests whatsoever. And the said James Gormley doth hereby for himself and his heirs declare and agree with the said parties of the second part their heirs and assigns that he and his heirs will stand seized and possessed of the said lands, tenements and hereditaments in trust for the said parties of the first and second parts in eight equal shares, and that he or his heirs, executors, and administrators shall and will at all or any time or times hereafter at the request, costs, and charges and expenses of the said parties of the first and second parts, sell and convey the said lands, tenements, and hereditaments, as they or the majority of them shall by any note in writing under their hands direct or appoint, and that in the meantime and until such conveyance, he the said James Gormley and his heirs shall and will stand seized of and interested in all said lands, hereditaments, and premises in trust only, and for the sole use and benefit of all the said eight parties of the first and second parts their heirs and assigns for ever in equal shares; and further, to pay unto the said Imperial Bank to the credit of and for the benefit of all the said parties in the names of the James Gormley and William Anderson, all the proceeds of any and all sale and sales of the said lands to be applied and appropriated as all the said parties of the first and second parts may appoint or direct.

In witness whereof the parties hereto have hereunto set their hands and seals.

Witness :

(Signed)

T. J. GORMLEY.

(Signed.)

J. GORMLEY.

{ L. S. }

McCarthy, Q. C., and Ritchie, for the plaintiff. The property in question was purchased by plaintiff and defendant with the intention of placing same on the market at once and reselling, and was clearly partnership property. The expenses were to be borne and the profits to be divided in the same way as if it had been an ordinary dealing in merchandise. The correspondence and whole course of dealing between the parties show that they stood in the relation of partners towards each other. The sale made here was not a sale of the interest of the defendant in the property to the eight parties, but was a sale of part of the assets of the partnership. Defendant could no doubt sell out his own interest in the partnership, but under such sale the purchaser of defendant's share would acquire only a right to have the accounts of the partnership taken and defendant's share paid over to him. Here defendant actually sold part of the assets of the part-

nership, and having done so it must be treated as a sale on behalf of the partnership, and defendant ordered to account for the profits made. Under the sale as made by defendant, the new men became co-owners, and plaintiff's rights are materially different from what they would have been had defendant dealt only with his own interest in the partnership. That defendant himself believed a partnership existed is evidenced by the fact that he concealed the syndicate sale from plaintiff, and that plaintiff also so believed is clear from the fact that he agreed at defendant's request after such sale to hold the property at \$475 instead of \$450 per acre. The quit claim deed was obtained by defendant from the plaintiff to enable him to carry out his sale to the syndicate as is shewn by the recital in the syndicate deed, and defendant obtained such quit claim deed by misrepresenting to plaintiff the purpose for which he required it. The syndicate purchased "two-thirds interest of lot 7, in the parish of Kildonan," a specific property as the agreement to purchase shows, and defendant conveyed a direct interest in the property itself, and not merely an interest in the partnership of which the property formed an asset: *Morrison v. Earls*, 5 O. R. 434; *Dunn v. English*, L. R. 18 Eq. 524; *Foster v. Hale*, 5 Ves. 308; *Lindley on Partnership*, 3rd ed. 58 and 698; *Story on Partnership*, 7th ed. Par. 412; *Collyer on Partnership*, Am. ed., 1878, 7, 8.

S. H. Blake, Q. C., for the defendant. The paragraph of the statement of claim alleging that both plaintiff and defendant agreed to try and procure other parties to become interested at an advanced price for the benefit of both is not proved. There was no sale of partnership property as pleaded. If there was such a sale as the plaintiff contends, then all the parties interested are not before the Court. The pleadings do not make a partnership case at all, and evidence cannot be given to show anything but a joint dealing. The plaintiff and defendant were nothing more than joint owners. Neither of them

ever contemplated from the inception of the purchase that they were to be the only two interested; on the contrary, both knew that others were interested on both sides behind them as nominal owners: *Smith v. Anderson*, 15 Ch. D. 247, 273. The defendant is merely a trustee under the declaration of trust, and either party was entitled to deal with his own beneficial interest in the land. The telegrams shew that the plaintiff did not wish to have a syndicate. Even if the parties ever were partners, the severance of their interest was manifested by the declaration of trust, and they then became trustee and *cestui que trust*. The syndicate arrangement only affects the defendants two-thirds interest, and not a two-third interest in the land. He only dealt with his own interest in the land. If there was no agreement to hold and sell in common, and the evidence shews there was none, then there is a right to partition. If there was a partnership, it was only one at will, and it rested in a present intention to sell, which might be broken off at any time. The Statute of Frauds applies when an attempt is made to prove partnership in lands by parol.

McCarthy, Q. C., in reply. It cannot be said that the plaintiff is not injured because a partnership of two has been enlarged to a partnership of ten. Before that was done, both partners were willing to sell *en bloc* at \$60,000 but now the eight will not join in a sale at that figure, because that is the figure upon the basis of which they came in.

If plaintiff's contention be correct, then the eight persons were merely sub-partners in respect of defendant's share, and not necessarily parties to the suit: *Lindley on Partnership*, 4th ed. p. 54.

The Statute of Frauds does not apply. It may be shewn by parol evidence that the property of a partnership consists of land: *Lindley*, 4th ed., p. 87, 88.

May 11, 1885. *BOYD*, C.—The syndicate for buying and selling lands which was the subject of consideration in

Morrison v. Earls, 5 O. R. 434, was based upon a written agreement which defined the objects of the association, and in regard to which the Chief Justice was of opinion that the general aspect of it was such as to constitute a partnership, there being community of interest in land, in profits, and in losses, although the parties may not have intended that it should so operate, p. 477. He elsewhere speaks of it (at p. 469) as a partnership, or in the nature of a partnership between the subscribers for the purchase and sale of the property.

In the present case the plaintiff and defendant met at Winnipeg and agreed to go jointly into the purchase of a tract of 150 acres at Kildonan, with the view of selling it forthwith in lots so as to realize their outlay as expeditiously and profitably as possible. Failing to get a ready sale for any of the lots into which they had it subdivided it was suggested that it should be disposed of *en bloc* to a syndicate, if such a combination could be effected.

I think it is proved that both parties knew that others were interested under each of the two principals. It is undisputed that the plaintiff had a one-third interest, and the defendant a two-thirds interest in the Kildonan property.

There appears to have been difficulty in getting up a syndicate which would take the whole, and an intimation was given to the plaintiff by telegram from the defendant on 16th March, 1882, that he was going to arrange a syndicate for two-thirds. It cannot be said that this was distinct notice of the scheme thereafter carried out by the defendant, and which is now the subject of complaint. But the question is whether with or without notice the defendant had the right to do as he did.

What he did was on 21st March to form a syndicate of eight (of whom he was one) to purchase his two-thirds interest in the Kildonan land. Upon this transaction he obtained a large profit, of which the plaintiff now claims a share. This arrangement as finally carried out is set forth in an indenture dated 23rd March, 1882, made between plaintiff of

the first part and the other seven of the second part. The first recital is in these words: "Whereas, the party of the first part is seized in fee of the lands hereinafter mentioned, and has signed a declaration of trust in favour of one J. E. Mitchell (*i. e.*, the plaintiff) as to an undivided one-third part thereof, and executes this declaration as to the remaining two-thirds." The deed then goes on in effect to declare that the party of the first part is seized of the undivided two-thirds in such wise that each of the eight parties may be entitled to a one-eighth share thereof. It then provides that he will sell and convey the said lands as they or a majority may direct, and meanwhile that he holds the same in trust for the said eight, their heirs and assigns, in equal shares, and upon sale, the proceeds are to be distributed as they may direct and appoint.

This instrument is not very formally drawn, and it anticipates the effect of two instruments which were afterwards executed. One was a quit claim deed signed by the plaintiff, dated 8th April, by which the fee simple of the whole property was vested in the defendant, and the other, dated 14th April, was a declaration of trust signed by the defendant in favour of the plaintiff. This last instrument is set out at length in the plaintiff's statement of claim, and it was prepared by the plaintiff's own solicitor. It recites that the quit claim deed was executed to enable the defendant to sell and convey the said lands to the purchasers of the lots into which the lands have been sub-divided, and that the instrument of the 14th April was given to declare the respective estates, rights and interests of both parties therein and thereto. It then declares that Mitchell is entitled to an undivided third interest in and to all the lands (describing them), and to the same interest in the proceeds arising from the sale of the said lands, or of any part or parts thereof, and that Gormley will stand possessed of all such moneys in the proportion of one-third thereof for Mitchell, his heirs and assigns less the one-third of the legal and other proper and necessary expenses in carrying out the sale of the said lands as intended and

agreed upon. The defendant then covenants that he will not sell for a less sum than \$60,000 without obtaining the consent of Mitchell.

For the purposes of the plaintiff's contention, it may be conceded that the transaction between plaintiff and defendant possesses all the characteristics of a partnership adventure. Can it then be claimed that the defendant is to account for the moneys received by him from the syndicate, as a benefit secretly or otherwise acquired by him out of the partnership business or partnership property?

This is not a tenable position in any point of view. There is manifestly no sale of any of the lots, or of any part of the land which belonged to the partnership. Two-thirds of the property has not been disposed of, so that it has passed out of the partnership. It is still there: though as to two-thirds of it, there may be a sub-partnership as between the defendant and his associates.

There has been no dealing with the joint property of the partnership out of which the defendant has made a profit. The subject matter out of which profit has arisen is the individual interest of one partner. He had sold some portions of his share of the undivided property: a thing he was not prevented from doing by any general law or by any special agreement. If injury has resulted to his partner from this act, as was strenuously argued at the bar, it is enough to say that no such case is made or proved, and even if made and proved it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern.

The opinion I had formed at the close of the case I still retain, and that is, that the action fails, and must be dismissed, with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

IN THE MATTER OF THE CANADA TEMPERANCE ACT OF 1878, AND AMENDING ACTS, AND IN THE MATTER OF A POLL HOLDEN IN THE CITY OF ST. THOMAS, ON THE 19TH OF MARCH, 1885.

Canada Temperance Act 1878—41 Vic. ch. 16, secs. 61, 62, 63—Scrutiny—Power of County Court Judge—Mandamus.

A County Court Judge will not be compelled by *mandamus* to enquire, on a scrutiny of ballot papers, under secs. 61, 62, 63, of the Canada Temperance Act 1878, (1) as to personation, (2) bribery, (3) the status on the voters' list of persons voting.

THIS was an application for a writ of *mandamus* directed to the learned Judge of the County Court of the County of Elgin, requiring him, upon a scrutiny of the ballot papers, under sec. 61, 62, and 63 of the Canada Temperance Act of 1878, to enquire :

1. As to personation.
2. As to bribery.
3. As to status on voters' list of persons voting—*i. e.*, whether they had ceased to have a right to vote since last revised voters' list; whether aliens, or on other grounds disentitled.

The learned Judge declined to go into these questions, and in a certificate stated his reasons as follow :

1. I have no doubt whatever that the 61st, 62nd, and 63rd sections of said Act were taken from those sections of the then existing Ontario Municipal Act which were numbered 313, 314, and 315, (R. S. O. ch. 174) or that both derived their origin from the same source.

2. Because the important provision of the 316th section of that Municipal Act is not embodied in the "Canada Temperance Act 1878," nor is any provision made like it which confers upon the County Judge powers and authority as to all matters generally arising upon a scrutiny, such as are possessed by him upon a trial of the validity of the election of a member of a municipal council, for which the 179th and following sections of that Municipal Act amply provided; from which I infer that the Legislature, when passing the "Canada Temperance Act 1878," only intended to provide that "On the day and at the hour and place appointed the returning officer shall attend before the Judge with the ballot papers in

his custody; and that the Judge, upon inspecting the ballot papers and hearing such evidence as he may deem necessary, and on hearing the parties, or such of them as may attend, or their counsel, shall in a summary manner determine whether the majority of the votes given was or was not in favor of the petition to the Governor General in Council."

3. Because I apprehend if more had been intended, the provision respecting the taking of evidence would not have confined the scrutiny to the "hearing of such evidence as the Judge may deem necessary," nor would the determination of the matter have been confined to a summary proceeding for deciding merely as to "the majority of votes for or against the petition."

4. Because I consider my views on the question borne out by a case reported to have been decided by the Supreme Court of New Brunswick, in *Ex parte Boyne*, copied into the Canadian Law Times (vol. 3, p. 218), from which I infer that it was considered that the Judge of the County Court has no right to enquire into grounds of scrutiny other than that of the number of votes cast either way, and that all that he can determine is whether the majority of the said votes given was or was not in favour of the petition; in other words, that the authority of the County Judge is only to make a recount of the ballots and to take such evidence as may be necessary or incidental to that recount.

5. Because the 70th section of the "Temperance Act, 1878," presents a remarkable feature in the case, and declares that no polling of votes under it shall be declared invalid by reason of a non-compliance with the rules contained in the Act, as to the taking of the poll, or the counting of the votes, under its provisions, * * if it appears to the tribunal having cognizance of the question that the polling of votes was conducted in accordance with the principles laid down in the Act, and that such non-compliance or mistake did not affect the result of the polling; and adopting the views advanced on this point by a correspondent of the Canada Law Journal (Vol. 20, New Series, No. 20, p. 374), I find nothing in the Act "to show what is the tribunal referred to * * probably all on reflection would admit that it is most desirable that the requirements of the Act should be very exactly carried out before the second part of the Act is brought into force. It therefore seems somewhat strange that no method of securing this is provided by the Act," and I see nothing constituting the County Judge acting under its provisions *a tribunal*," as he is under the Dominion Statute 32-33 Vic. ch. 35, sec. 5, and R. S. O. ch. 45.

6. Because, with the authority of the Supreme Court of New Brunswick before me, I think it my duty to order and determine that the scrutiny of votes shall be confined to the inspecting of the ballot papers and hearing such evidence as may be necessary or incidental and pertinent to that proceeding, and to the determining whether the majority of votes given was or was not in favour of the petition.

7. Because, if my views are not correct and cannot be sustained upon a more correct reading of the statute referred to, and if the petitioners are so advised, my refusal to go beyond the enquiry I have pointed out, and to which I consider my duty under the statute limits me, may be taken

as the ground for an application for a writ of *mandamus* to compel me to proceed otherwise, in the same way as those opposed to the Act in the Province of New Brunswick applied to the Supreme Court there to *prohibit* the Judge from doing the very thing which those opposed to the Act petition me to do here now.

Colin Macdougall, for the motion.

T. W. Crothers, contra.

July 6, 1885. ROSE, J.—Formal objection was taken to my right to entertain the motion, but this was, as I understood, not pressed further than on the question of costs, as it was desired by both parties and, indeed, suggested by the learned Judge, that this motion should be made in order that the opinion of the Court might be taken, and that when given it would be submitted to and acted upon.

I, therefore, do not further consider the right to make the order asked.

It seems to me, secs. 46, 47, 48, 49, 50, 52, 53, 58, 59, 61, 62, 63, and 96, when read together, do not leave room to doubt as to the powers and duties of the learned Judge under secs. 61 and 62.

By sec. 46 the Deputy Returning Officer, immediately after the close of the poll, is "to open the ballot box and proceed to count the number of *votes* given for and against the petition. In doing so he shall reject all *ballot papers* which are not similar to those supplied by the Deputy Returning Officer, and all those upon which there is any writing or mark by which the voter could be identified."

A distinction is here made between "*votes*" and "*ballot papers*." A vote is "the expression of a wish, desire, will, preference, choice, in regard to any measure." "This vote or expression of will may be given by holding up the hand, by rising and standing up, by the voice (*viva voce*), by ballot, by a ticket, or otherwise." Hence the secondary meaning, "that by which will or preference is expressed in elections or in deciding propositions; a ballot, a ticket, &c., as a written vote." See the Imp. Dict. p. 1189.

I have noted this, as it was argued that if the words of the statute had been "scrutiny of votes," it would have included the scrutiny of the right to vote.

This does not seem necessarily so, but if the expression "vote" be of wider meaning than "ballot paper," it may be the use of the words of restricted meaning supports the position taken by the learned Judge.

It is clear that the ballot paper is only evidence of the expression of the wish or preference, and is quite distinct from that of which it is the evidence.

Apparently a rejected ballot paper is not considered evidence of a vote, and hence in counting the votes rejected ballot papers are not counted.

It follows that in counting votes judgment and discretion must be exercised, ballot papers compared, and writing or marks scrutinized.

By sec. 47 separate lists are to be kept shewing the number of votes and of rejected ballot papers; and "all the ballot papers indicating the votes given for and the votes given against the petition respectively shall be put into separate envelopes or parcels, and those rejected shall be put into a different envelope or parcel, and all these parcels being endorsed so as to indicate their contents shall be put back into the ballot box."

The distinction between the votes and ballot papers is here carefully preserved.

By sec. 48, "The deputy returning officer shall take a note of any objection made by any agent or any elector present to *any ballot paper found in the ballot box*, and shall decide any question arising out of the objection; and the decision of such deputy returning officer shall be final, subject only to reversal on a scrutiny as hereinafter provided."

By sec. 49, "Each objection to a ballot paper shall be numbered and a corresponding number placed on the back of the ballot paper, and initialled by the deputy returning officer."

By sec. 50, "The deputy returning officer shall make out a statement of the *accepted ballot papers*, of the number of *votes* given each way, of the *rejected ballot papers*, of the spoiled and returned ballot papers, and of those unused and returned by him," and these, with the voters' lists, &c., shall be returned to the returning officer.

By sec. 52 the deputy returning officers shall, on request, give to agents or electors "a certificate of the number of *votes* given in each interest, and of the number of rejected *ballot papers*."

By sec. 53 the returning officer is to "add together the number of votes given in each interest."

By sec. 58, "Within two weeks after the summing up of the votes, if no Judge has appointed a day or place within the county or city for entering into a scrutiny of the *ballot papers*, as hereinafter provided for, and *in case of such a scrutiny* being entered into, then forthwith, after the Judge has determined whether the *majority of the votes* given was or was not in favour of the petition, the returning officer shall transmit his return to the Secretary of State, and shall send with it a *report of his proceedings* in which he shall make any observations he may think proper as to the state of the ballot boxes or ballot papers as received by him, and in the event of a Judge *having determined*, after a *scrutiny* of the *ballot papers*, that a majority of the *votes* given was or was not in favour of the petition, such return shall be based upon, and shall be conformable to such decision."

Section 59 provides for transmission to the Secretary of State of all statements, lists and documents used or required at the election.

By section 61, upon application to the Judge, and upon shewing by affidavit reasonable grounds for entering into a *scrutiny* of the ballot papers, the Judge shall appoint a day for entering into the scrutiny.

By section 62, "On the day and at the hour and place appointed the returning officer shall attend before the Judge with the *ballot papers* in his custody." Nothing is said as

to the voters' lists and certified statement returned to him under section 50; "and the Judge upon inspecting the *ballot papers and hearing such evidence as he may deem necessary*, and on hearing the parties, or such of them who may attend, or their counsel, shall in a summary manner determine whether the *majority of the votes given* was or was not in favour of the petition to the Governor-General in Council."

By sec. 63, "The decision of the Judge shall be final * *."

By sec. 96, if the petition has been adopted "the Governor General *may* * * by Order in Council published in the Canada Gazette, declare that the second part of this Act shall be in force * *." It will be remembered that by sec. 59 the voters' lists, &c., are to be sent to the Secretary of State.

Thus it appears to me provision is made for the Deputy Returning Officers scrutinizing the ballot papers as they are found in the ballot box after the voting has ceased. He may accept some and reject others. The rules for his guidance are found in the Act; and if he errs, his decision on such questions as he may decide is open to review on appeal to the County Judge, who, looking at the ballot papers, accepted or rejected, comparing any objected to with those furnished by the Deputy Returning Officer, scrutinizing the writing or marks upon them and taking such evidence as he may deem necessary, shall determine in a summary manner, and not subject to review, whether the majority of the votes given was or was not in favour of the petition.

He is not directed to inspect the rolls or voters lists, to look into a voter's status, to enquire into his right to vote, to scrutinize his vote, but merely to see whether, if the ballot paper, which he could not have received had he not been *prima facie* entitled to vote, was tendered by him in such a condition as made it receivable as evidence of his having voted, that is, of having expressed his wish or preference. If the majority of votes evidenced by proper ballot papers is in favour of the petition, the Governor

General in Council has evidence of the will of the majority upon which he *may* act.

It would seem as if the word "may" was thus introduced into the 96th sec. to enable evidence to be brought before the Governor General in Council of the *apparent* result not being correct, and to enable him in his wisdom to cause an enquiry to be held to investigate the alleged frauds, if any.

It does not become necessary to determine this latter question; but if it be as is suggested, then possibly there would be a "tribunal" to which the provisions of sec. 70 would refer.

I have read the full text of the judgment in *Ex parte Boyne*, 22 S. C. of N. B. 228, referred to by the learned Judge of the County Court. The judgment does not turn upon this question. The observations of the dissentient Judge, Mr. Justice Weldon, go much farther than is necessary to support the conclusion arrived at in this case, and while the learned Chief Justice expressly states that he offers no opinion, it seems not unfair to conclude from his language that he had not formed an opinion adverse to such conclusion.

Mr. Crothers pointed out that the security given is only \$100, the same as for a recount under the Parliamentary Election Act; that severe penalties are provided by sections 64 to 96, but nothing is said as to avoidance of the election or of votes; and that there is no reference in the statute to personation, except in section 44.

It may be that such double ballots as are allowable under section 44 could be enquired into by the Judge, as apparently both ballots would be found in the ballot box.

It is not stated in the petition that there were any such double ballots.

Mr. Crothers also argued that there are no means under the Act of finding out how a person voted, and no means of identification, relying on sections 33, 34, and 35.

I have not considered these arguments, and only state them to afford ground for further consideration, if in this or any other case it becomes necessary.

The fact that sections 61 and 62 are similar to 313, 314, and 315, cap. 174, R. S. O., the Municipal Act, and that sec. 316 is omitted, which gives the Judge like powers and authority as to all matters arising upon the scrutiny as are possessed by him upon a trial of the validity of the election of a member of a municipal council, and that no provisions have been introduced into the Temperance Act similar to those for such a trial, is a most formidable objection to this application.

On the whole, I am clearly of the opinion that the learned County Court Judge was quite right in not entering into the questions to compel the consideration of which I am asked to direct the issue of a writ of mandamus, and therefore the order *nisi* must be discharged, with costs.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

ENRICK ET AL. V. TOWNSHIP OF YARMOUTH.

Tolls—Refusal to pay—Demand—Distress—R. S. O. ch. 152, sec. 131—Pleading.

Held, on demurrer to the statement of defence herein, omitting the allegation of demand and refusal of toll at the gate, under R. S. O. ch. 152, sec. 131, and a seizure immediately following thereon, that the demand should have been at the gate, and the seizure should have followed immediately thereupon; and that the statement of defence was therefore bad.

THIS was a demurrer to the statement of defence herein.

The action was for trespass in seizing or distraining the plaintiff's horse and waggon under sec. 131 of cap. 152, R. S. O., The Joint Stock Road Company's Act.

V. *McKenzie*, Q.C., for the demurrer.

McDougall, of St. Thomas, contra.

The statement of defence and grounds of demurrer, with the argument, are set out in the judgment.

July 4, 1885. ROSE, J.—Sec. 131 of ch. 152, R. S. O., provides that "If any person, subject or liable to the payment of any toll, by virtue of this or any former Act, neglects or refuses, *after demand thereof*, to pay the same, the person authorized to collect such toll may, by himself, or taking such assistants as he thinks necessary, seize or distrain any horse, cattle, carriage, or other thing in respect of which such toll is imposed." * * *

Sec. 132 provides for sale if toll not paid within four days of the seizure.

The statement of defence sets out that the plaintiffs "wilfully and wrongfully * * passed the toll gate * * without first paying the legal toll * * and the said Elliot * * at the Town of Tilsonburg, the place the plaintiffs had arrived at after having run the said gate, and being the first place the said Elliot overtook them, having demanded payment of the said toll, * * and the plaintiffs having refused to pay the same or satisfy the said demand,

by himself and assistants * * seized and distrained said horse and buggy," &c.

The plaintiffs contend that the defendants, in order to justify, must shew a demand and refusal at the gate, and seizure, while passing, or at least within the municipality.

The seizure was made in the adjoining County of Oxford.

Sec. 129 provides that "If any person not exempted by law from paying toll, wilfully passes or attempts to pass any toll gate, check gate, or side bar, lawfully established, without first paying the legal toll, he shall forfeit a sum not exceeding \$20," to be recovered by distress, and in default of distress imprisonment, and the fine goes to the company or municipality owning the road.

By sec. 129 no demand is made necessary.

Counsel were unable to assist me by referring to any case in point, and although the clause in question formed part of the Highways (Turnpike) Act of 1822, 3 Geo. IV. ch. 126, sec. 39, there seems to be no reported decision on the precise point. Such as in any way bear on the question may be found in Mew's edition of *Fisher's Digest* under the head of "Ways."

Mr. McDougall referred me to *Regina v. Irving*, 12 Q. B., p. 429, a decision on sec. 139 of 3 Geo. IV. ch. 126. I have only been able to draw from it the comfort of finding that a Court composed of such eminent lawyers as Lord Denman, C. J., Erle, Patteson, and Coleridge, JJ., found its interpretation so difficult that the Court was equally divided.

The Sessions had quashed a conviction, subject to the opinion of the Court of Queen's Bench. Lord Denman, C. J., after stating the points, said: "This seems to me so extraordinary a contradiction that I must suppose there is some mode of explaining the difficulty, though I cannot find it out. On the whole, I think it best not to disturb what has been done."

I find great difficulty in construing the section placed before me by this demurrer.

Section 129 creates an offence, and provides a severe punishment. The offence is wilfully passing, or attempting to pass a gate without first paying the legal toll. This would cover the case of a person passing on a "run," as the pleading states, before the toll collector had time to come out of the toll house, and therefore before any toll could be demanded and refused. It would also cover the case of a refusal after demand, such being evidence of the act being wilfully done.

It seems clear that under sec. 121 before seizure there must be a demand and refusal. Must the demand and refusal be at the gate, or must it merely precede the seizure? It may be, contrary to one of Mr. McKenzie's arguments, that the seizure need not be at the gate, or at the moment of default, because the section reads, "taking such assistance as he thinks necessary;" and the seizure need not be of the property on which the toll is imposed, but of "any of the goods and chattels of the person so required to pay."

If he may take assistants to seize any property, then, unless this is to be confined to goods carried though not liable to toll, it may be that he may take assistants to seize the horse, &c., after it has passed the gate; indeed, it would in most cases be practically impossible to procure the assistants and make the seizure at the moment of passing.

If the demand need not be at the gate, then, suppose the person passing through the gate passes when the collector is momentarily absent, or, it may be, sitting by the gate and has fallen asleep, could the collector, returning or awakening immediately after the person had passed through and while yet in sight so as to be recognizable, procure assistants and follow him, and demand, and, in case of refusal, seize, &c.? May he postpone the following for, say months, and then demand and seize? Must the following be immediate?

There is nothing in the clause as to following, and no limitation as to time or distance. Must the seizure be

within the municipality, as contended by Mr. McKenzie? Nothing is said as to this.

If a person, taking advantage of the momentary absence of the collector, wilfully passed through the gate without paying the toll, would the collector be justified the same or the next day, if he met him on the street, in demanding the toll, and, on refusal, in procuring assistants and going to his stables and taking out the horse and buggy and selling same; or in going to, say, the livery stable from which the conveyance was hired and making the seizure?

The section would not present so many difficulties if it be held that its meaning is that, if toll be demanded at the gate and then refused, the collector, with such assistants as he thinks necessary, may at once seize the horse, &c., and any other goods and chattels of the person so required to pay for their being carried, and if he be unable to make the seizure, then that sec. 129 gives a complete remedy. Under secs. 129 and 143 he recovers not his toll, but the penalty of \$20, which, of course, would be far more than the toll.

In 3 Geo. IV. ch. 126, sec. 40, it is provided that if any dispute shall happen to arise about the amount of tolls due or the charges of making, keeping, or selling the distress, such dispute may be settled by some Justice of the Peace for the county, division, or place where is situate the toll gate at which the toll in dispute shall be payable, and the collector is authorized to keep the balance of the amount received on the sale until the dispute is settled.

This may afford some slight indication as to locality.

In *Peacock v. Harris*, 10 East 104, an action by the collector for tolls for which he had given credit, in the judgment of Leblanc, J., p. 108, we find the following sentence: "It has been also objected that the tolls are not the subject of an action, but if refused could only be levied by distress upon the carriage &c., when passing." In the report of the argument nothing is said as to this, and it would seem that this sentence is the learned Judge's own language, stating some argument addressed to the Court.

The words I have italicised may indicate the opinion then prevalent as to the object of the section.

In *Maurice v. Marsden*, 19 L. J. N. S., C. P. p. 152, another action of debt for tolls, in argument of counsel appears this sentence: "If the toll is not paid when demanded the collector may *detain* the horses or carriages." This may mean a seizure at or near the gate rather than a following.

The gate is the place appointed for payment. There naturally the demand would be made, and if one spoke of a refusal to pay toll without further explanation most persons would think it meant a refusal to pay at the place appointed, *i.e.*, at the gate.

Maurice v. Marsden shews facts on which a verdict for the plaintiff in a civil action was sustained without a demand, the plaintiff having misrepresented facts which led to the collector not making a demand.

Wilson v. The Corporation of Middlesex, 18 U. C. R. 348, was an action of replevin for goods seized for toll. The statement of facts is: "Replevin for a carriage, horse, and harness of the plaintiff taken by defendant *in* the gravelled road leading from the City of London to Port Stanley, and on that portion of said road *which immediately adjoins* Westminster Bridge."

The question involved was as to the right of the municipality to impose toll upon the bridge.

The avowry states that "the plaintiff's carriage, being liable to pay the said toll of 1d., the defendant Langham * * demanded the same, and on a refusal seized the property as a distress for the said toll. *Plea*—"That at the said time, when, &c., he was driving his mare and carriage along the said traverse, * * when the defendant Arthur Langham * * demanded toll from the plaintiff, which he refused to pay." * *

The pleadings further shew that "the said corporation duly passed a certain other by-law for raising money *by toll on the said Westminster Bridge*."

It seems reasonably clear that the demand and seizure were in that case made at the place where the toll was payable.

On the whole, I am of the opinion that the demand should have been at the gate, and the seizure immediately following thereupon, although possibly it is not necessary for the determination of this demurrer that I should say where the distress should be made.

It seems to me that so many difficulties present themselves, if we adopt the defendants' view, that it will be more prudent to decide as I do, leaving the defendants, if so advised, to take the opinion of the full Court, or the Court of Appeal before going on with the trial.

The demurrer must be allowed, with costs to the plaintiffs in the cause in any event, the defendants to have liberty to amend as they may be advised.

Judgment for plaintiffs on demurrer.

[QUEEN'S BENCH DIVISION.]

COLBORNE V. THE TOWN OF NIAGARA FALLS.

Municipal Act 1883, sec. 96, sub-sec. 46—Hack stands—Quashing by-law—Laches.

Where it was admitted that a by-law was within the powers of a municipal council under sub-sec. 46 of sec. 96 of the Municipal Act 1883, "for authorizing and for assigning stands for vehicles kept for hire on the public streets and places," &c., the Court refused to quash the by-law on the ground, alleged by the applicant, that the stand interfered with the view of the Falls from the hotel in question: that the manure on the stand was offensive, and the noise of the hackman a nuisance, these being matters of municipal regulation, and the aid of the Court if successfully invoked, being an interference with the discretion of the municipal council, and especially so as the stand in question had been there for twelve years and maintained under successive by-laws.

THIS was a motion to quash clauses 5 and 6 in sec. 25 of by-law No. 147 of the Town of Niagara Falls, passed on 5th June, 1884, authorizing hacks to stand on the street in front of the applicant's house, on the following grounds:

1. That they were unreasonable and not in the public interest, but in that of a class.

2. That the hack stands established by the said clauses were unauthorized and unreasonable, obstructive to the highway opposite and near the premises of the said Colborne, and a public nuisance.

3. That the said stand interfered with the fair enjoyment by said Colborne of his property as lessee of the Clifton House, and injured his business as well, &c., &c.

A. Hill, for the motion.

W. H. McClive, contra.

It was admitted that the passing of the by-law was within the powers of the council, under sub-sec. 46, sec. 496, Municipal Institutions Act, 1883, which is as follows: "For authorizing and for assigning stands for vehicles kept for use on the public streets and places, * * "

It was urged that the stand interfered with the view of the Falls from the ground floor of the Hotel, that the manure on the stand was offensive, and the noise of the hackmen a nuisance.

July 1, 1885. ROSE, J.—The two latter objections do not necessarily arise from the stand being allowed to be in that place. Under proper regulations it ought to be kept clean, and the drivers not allowed to make an excessive noise. This is a matter for municipal regulation, and if the stand prove a nuisance for the reasons assigned, or others, the proper steps may be taken to abate the nuisance.

What the Court is really asked to do is to interfere with the discretion of the Council and direct the removal of the stand to another place. If I am to do this, it will, I think, be necessary for me to examine all the convenient locations and determine the one which will be the least objectionable and most convenient. But this is the duty of the gentlemen chosen by the ratepayers to manage their municipal business, and I have no power or inclination to substitute my discretion for theirs.

Moreover it appears that this stand has been in its present location for the past twelve years, and maintained under successive by-laws. This is in my view a complete answer to the application. None of the by-laws have been moved against until the present application.

The first by-law was No. 17, passed on the 29th of April, 1873, and since that date thirteen by-laws have been passed amending and otherwise dealing with the original by-law. The by-law moved against is a consolidating as well as an amending by-law, dated 3rd of June, 1884, and not moved against until the 27th of May, 1885.

If I had the power I think I should not exercise it after so great delay, but should exercise the discretionary power to refuse the application.

The order *nisi* must be discharged, with costs.

Order nisi discharged, with costs.

[CHANCERY DIVISION.]

WELLS v. THE TRUST AND LOAN COMPANY OF CANADA.

Mortgagor and mortgagee—Accounting for surplus after sale under mortgage—Reasonable expenditure by mortgagee—Employment of agent to sell—Legal expenses.

The T. & L. Co. being mortgagees of land in Ontario, held a collateral mortgage on lands in Kansas. Default occurring they sold the lands in Ontario, through one W., a land agent, who had acted also under a power of attorney for C. the mortgagor, who had agreed to a commission being allowed to him for selling. W. did not, however, actually sell until after C.'s death, when the T. & L. Co. paid him his commission.

Held, on action for an account brought by an execution creditor, who had obtained his execution after the power of attorney had been given to W., and after the said agreement as to commission, that the commission was a proper item to allow the T. & L. Co. in their account.

After the mortgage on the Kansas lands had been executed, the mortgagees discovered that the lands comprised in it had been sold for taxes, and that there were also several executions against them, and they incurred expenses in attempting to stay the executions, and set aside the tax sales. The mortgagor, C., had approved of these proceedings being taken.

Held, that these expenses ought also to be allowed to the T. & L. Co. in their accounts, for whatever bound the mortgagor in taking the accounts bound the plaintiff to the same extent.

The T. & L. Co. further incurred expenses in prosecuting unsuccessful litigation arising out of a claim made by them as landlords under the distress clause in their mortgage, to certain goods of C. seized by the sheriff under executions against him. C. did not sanction this litigation.

Held, that this expenditure could not be allowed to the T. & L. Co. in taking the accounts, but that as they made a certain sum by this litigation, the costs up to that point should be allowed to them.

The general rule is, that a mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful proceedings at law instituted by himself, and not undertaken with the approval of the mortgagor.

THIS was an action brought by Martin Wells, who was an execution creditor of one David Christie, claiming from the Trust and Loan Company of Canada an account of the moneys realized by them on a sale of certain lands comprised in certain mortgages made to them by Christie.

The original mortgage was dated March 23rd, 1877, and comprised certain lands in the township of Brantford, in this Province, and purported to secure \$34,000 and interest. A collateral mortgage was, by deed of November 1st, 1879, given upon certain lands in Kansas, one of the United States of America, and was upon the ex-

pressed consideration of \$34,000, and of the Company, at the request of Christie, and upon his promise to enter into these presents, having forborne to take proceedings to realize upon and compel the payment of the sum secured by the original mortgage, and for the purpose of further and more fully securing the payment of the said indebtedness.

Default having been made in payment of the indebtedness so secured, the Company sold under their power of sale in the original mortgage the lands in Brantford, but failed to realize the full amount of their claim. They then sold the lands in Kansas, as the terms of the collateral mortgage authorized them to do, and realized sufficient not only to cover their claim but to leave a surplus. The plaintiff in this action had his writ of *feri facias* against lands in the Sheriff's hands, but he had no lien on the lands in Kansas.

He now, however, issued his writ in this action claiming from the Company an account of their disposition of the proceeds of both sales.

Immediately after the issue of the writ, on October 31st, 1883, a judgment was by consent pronounced by the Master in Chambers referring the action to the Master in Ordinary to take the following accounts: (1). An account of the amount realized by the defendants under the mortgage of March 23rd, 1877. (2). An account of the amount realized by them under and by virtue of any securities held by them as collateral to the said mortgage. (3). An account of the application which the defendants were entitled to make of the moneys which should be found to have been received by them as aforesaid. And, with the like consent, it was further ordered that the surplus, if any, which should be found to be in the hands of the defendants, after payment of the amount they should be found entitled to apply to the payment of their claim under the said mortgage and securities, should be by them paid over to the plaintiff forthwith after the Master should have made his report.

In taking the accounts the Master in Ordinary disallowed certain items in the defendants' account, which gave rise to the present appeal, the defendants contending in their reasons of appeal that the charges so disallowed were incurred by the defendants as mortgagees of the property in question, and were reasonably incurred by them under such circumstances as entitled them to be allowed therefor as for reasonable costs, charges and expenses as such mortgagees.

There were three classes of items in the defendants' accounts : (1). Certain charges made by and sums paid to Mr. Whitney, a land agent, who negotiated the sale of the lands in Brant, acting under a power of attorney given to him by Mr. Christie, in 1879. (2). Costs of a certain action in the courts of Kansas brought upon the collateral mortgage, in which the Company failed. (3). Expenses in connection with a distress made under the power to distrain in the original mortgage, and of proceedings incidental thereto by way of interpleader, which proceedings comprise the reported case of *The Trust and Loan Company of Canada v. Laurason*, 45 U. C. R. 176, 6 A. R. 236, 18 C. L. J., p. 400.

As to the first of these classes of items Mr. Whitney gave evidence before the Master as follows :

" I had for two or three years, I think, been acting for Mr. Christie in trying to sell his property. I had negotiations with several people, and it resulted at last in a sale to Mr. Milloy. * * I had a power of attorney from Mr. Christie to manage and sell his property for the purpose of satisfying the mortgage to the Trust and Loan Company. That was the Brant property. * * They were proceeding to press him, and he suggested appointing me as attorney to use my discretion in the sale of the property, to avoid any unnecessary expenses of a forced sale, and to manage the property generally. It was that that led to my acting for him. * * Mr. Christie died, and the sale was made after his death. I went on after his death just the same collecting the rents and eventually sold it. After a great many negotiations with other people I sold to Mr. Milloy, and then made the charge which is there."

As to the proceedings in Kansas, it appeared from the affidavit of the accountant of the defendants that at the time when the defendants acquired the security upon the Kansas lands, the whole of the lands covered by the said security had, as the defendants thereafter discovered, been sold for taxes, and the time limited by the State of Kansas during which alone the defendants would be able as of right to redeem the said lands from the tax purchaser thereof had very nearly expired when the defendants discovered the fact of such sale. Shortly after the defendants acquired the said Kansas security they also discovered, as the fact was, that a considerable portion of the lands covered by the said security were also covered by executions against the said Christie, and that the lands were likely to be sold under the said executions, or some of them, within a few days from the time at which they made the said discovery, and thereafter they took proceedings to stay the threatened sales under the executions, and to vacate the tax sales.

The third class of items related to the costs in connection with the special case submitted to the Court of Queen's Bench, and afterwards carried by way of appeal to the Court of Appeal and to the Supreme Court, and reported as *Trust and Loan Company v. Lawrason*, 45 U. C. R. 176, 6 A. R. 286, 18 C. L. J. 400.

The Master found: (1). That Mr. Whitney had acted as the agent of Christie, and not as the agent of the defendants in the sale of the lands, and that his commission was a personal charge against Christie. (2). That the litigation respecting the Kansas lands failed, having been improperly bought. (3). That the interpleader proceedings had been taken by the defendants at their own risk, and the costs had been awarded against them in *Trust and Loan Company v. Lawrason*, and were not chargeable.

The rest of the facts in connection with these matters sufficiently appear from the judgment of Boyd, C.

The appeal was heard on September 3rd, 1884, before Boyd, C.

Marsh, for the defendants. As to the costs in connection with the interpleader proceedings, the test is, were these costs incurred reasonably by the mortgagees? Would a prudent man have done what the Company did? *Ramsden v. Langley*, 2 Vern. 535; *Loamax v. Hyde*, ib. 185. Success is not the test of the reasonableness: *Ellison v. Wright*, 3 Russ. 458; *Re Watts*, 22 Ch. D. 5; *Parker v. Watkins*, 1 Johns. 133; *Godfray v. Watson*, 3 Atk. 517. The respondent will probably rely on *Peerse v. Ceeley*, 15 Beav. 209, but that case does not conflict with the rule that reasonableness is the test, though it adopts success as the rule of reasonableness. However, the remarks of Jessel, M. R., and Cotton, L. J., in *Re Watts*, *supra*, show that not success but reasonableness is the proper measure of the rights of the parties. The matter as to these costs does not rest on the contract between the mortgagor and mortgagees, but upon the practice of the Court respecting such contracts: *Dunstan v. Patterson*, 2 Phil. 341; *Ex parte Fewings*, 25 Ch. D. 338; *Wetherell v. Collins*, 3 Mad. 255; *Skae v. Chapman*, 21 Gr. 534; *Kay v. Wilson*, 24 Gr. 212; *Dougall v. Dougall*, 26 Gr. 401; *Yorkshire Railway Wagon Company v. Maclure*, 19 Ch. D. 478. As to Mr. Whitney's charges, we refer to: *Pardoe v. Price*, 16 M. & W. 451; *Gilbert v. Dyneley*, 3 M. & G. 12; *Fisher on Mortgages*, 4th Ed., Sec. 1473; *Mulholland v. Merriam*, 19 Gr. 288, 20 Gr. 152; *Shaw v. Shaw*, 17 Gr. 282; *Roberts v. Hall* 1 O. R. 388; *Re Flavell*, 25 Ch. D. 89. As to the Kansas items, the mortgagor approved of this litigation. Besides in these proceedings the Company were acting for the benefit of all parties, and were reasonably protecting their mortgage security. The plaintiff was merely an execution creditor having a charge on the Brant lands, and could merely call the Company to account for what they actually realized from their collateral Kansas security, or what they acting reasonably should have realized.

C. Moss. Q. C., for the respondent. The mortgagees are in the position of one who has exercised the power of sale and is accounting for the surplus; the plaintiff is not suing for redemption: *Boulton v. Rowland*, 4 O. R. 720; *Beatty v. O'Connor*, 5 O. R. 747. The position of an execution creditor is not the same as that of the original mortgagor. After his execution is lodged his rights are fixed, and the defendants knew of this incumbrance, before they tried to sell under their power of sale; *Cocks v. Gray*, 1 Giff. 77. All the distress proceedings were after the plaintiff's execution. As to the Kansas items, the action was not warranted and it failed. The plaintiff has a right to have an account of all moneys realised from all the defendants' securities. As to Whitney, he was acting not for the defendants, but for Christie alone. By paying Whitney the Company gave away a part of the mortgage security, and misapplied it to the prejudice of the execution creditor.

Marsh, in reply. The Company adopted what Whitney did in the sale of the land, and so made him their agent *Patterson v. Kingsley*. 25 Gr. 425.

October 22nd, 1884. BOYD, C.—I was of opinion at the close of the argument that the Master should not have disallowed the defendants' claim for commission paid to Mr. Whitney in effecting a sale of the premises. Provision was made between the mortgagor and Mr. Whitney for the allowance of a commission if he should sell the property. This was long before the plaintiff was an execution creditor; giving effect to this does not therefore derogate from the statutable lien of the plaintiff, for he can only get so much as this execution debtor had the right to give. And besides this, by the mode of dealing the mortgagees adopted Mr. Whitney as their agent, availed themselves of his services, accepted the purchaser he procured and consented to his having his commission. The charge is not in principle improper: *Union Bank of London v. Ingram*,

16 Ch. D. 53, and I think it should have been allowed in the present case. This ground of appeal succeeds.

As to the costs and charges of the litigation in Kansas, I still think, as at the close of the argument, that the Master should have allowed these also. The mortgage on the Kansas lands was collateral to the mortgage on the Ontario lands. The plaintiff had no lien upon the Kansas lands, but his equity is to have the accounts taken as to these lands in order to marshal the defendants' securities for his, the plaintiff's, benefit. But the accounts to be taken are those between mortgagor and mortgagee, and whatever binds Christie, the mortgagor, in the taking of the Kansas accounts to the same extent affects the plaintiff. Mr. Christie was consulted about the litigation instituted to vacate the tax sales, and approved of it. It was entered upon with his sanction, and as against him the costs and charges are properly chargeable against the proceeds of the Kansas lands as part of the "all just allowances" which the Master is to make under the general orders.

Upon the third class of items I agree with the Master's conclusion that they should be disallowed. The Company, in order to satisfy part of their demand under the mortgage, made a distress upon goods which had been seized by the sheriff under executions. The Company claimed the privilege of landlords under the Statute of Anne, but after considerable litigation their claim was rejected, and they were mulct in costs. The mortgagor did not request or sanction this litigation. As against him it could not be charged, nor can it be against the present plaintiff. The general rule is, that the mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful proceedings at law instituted by himself and not undertaken with the approval of the mortgagor: *Peerse v. Ceely*, 15 Beav. 209; *Cocks v. Gray*, 1 Giff. 77; *Burke v. O'Connor*, 4 Ir. Ch. R. 418. As the Company made \$1,100, however, by this distress and claim under the interpleader, it is reasonable to allow them their costs down to that point, which the

Master can apportion (a). As to the costs of this appeal the simplest way is to allow the Company one-third of their bill as against the plaintiff.

A. H. F. L.

[CHANCERY DIVISION.]

CLARK V. THE HAMILTON PROVIDENT AND LOAN SOCIETY.

Fraudulent preference—Action by secured creditor.—R. S. O. ch. 118.

H., a creditor of S., in respect of a debt for which he held security on the lands of S., sought to have a chattel mortgage made by the latter declared void as a fraudulent preference.

Held, that in the absence of proof that the security held by him was inadequate he could not succeed.

This was an interpleader issue wherein George Clark was plaintiff, and the Hamilton Provident and Loan Society were defendants, and in which the plaintiff affirmed and the defendants denied that certain goods and chattels on the 2nd day of February, 1884, seized in execution by the Sheriff of Halton under a writ of *fi. fa.* issued for the levying of execution of a certain judgment recovered by the defendants in an action against Joseph Smith were, or some part of them was, at the time of such seizure the property of the plaintiff as against the defendants.

The issue was tried on April 19th, 1884, before Proudfoot, J., at Hamilton.

(a) The explanation of this passage in the judgment is as follows: The Sheriff, on behalf of execution creditors, seized for more than was sufficient to exhaust all the goods seized. The Trust and Loan Company, under 8 Anne, c. 14, served notice on the Sheriff as landlords. The Sheriff interpleaded, and when the interpleader application came up in Chambers only three of the execution creditors took issue, the rest abandoning their claims. The result was, the Master in Chambers ordered the Sheriff to retain sufficient to pay the three who took issue, and the Sheriff handed over the balance to the Company, which balance amounted to \$1,100.

It appeared that the plaintiff claimed under a chattel mortgage executed by Mr. Joseph Smith on December 14th, 1883.

The rest of the facts of the case and the evidence adduced sufficiently appear from the judgment of Boyd, C.

At the conclusion of the evidence on April 19th, 1884, PROUDFOOT, J., gave judgment as follows :

"It seems to me a doubtful matter whether the defendants have the right, their debt being a secured debt, to interfere with this chattel mortgage. My present impression is, that they cannot, and that the plaintiff is entitled to recover; and probably I had better give the defendants an opportunity of bringing it up at re-hearing. I think the plaintiff is entitled to a verdict. I think it is by no means a clear case on the authorities, but that is my present impression that it should be so."

On the 12th day of September, 1884, the defendants moved by way of appeal to the Divisional Court.

Muir and Crerar, for the defendants.

Ritchie, for the plaintiff.

The following authorities were referred to on the argument: *Masuret v Mitchell*, 26 Gr. 435; *Stephens v. Olive*, 2 Bro. C. C. 90; *Manders v. Manders*, 4 Ir. Eq. 434; *May on Fraud. Conv.*, pp. 50, 140, 142; 47 Vic., c. 10, O., s. 3.

December 18th, 1884. BOYD, C.—The sole question in this case is, whether the chattel mortgage of the plaintiff is void as against the execution of the defendants. It is affirmed by the defendants that such is the result because that mortgage was made by the execution debtor when in insolvent circumstances, with intent to prefer the plaintiff within the meaning of the R. S. O. c. 118. There is no evidence of any other creditors of Smith the debtor than these two. The defendants hold security for their claim, which, upon the circumstances of this case, it is to be fairly inferred, is a good and sufficient security for the balance due to them, and though the effect of mortgaging the

chattels to the plaintiff may be to delay the defendants in making their money out of goods and defeat them as to these goods, it does not follow that the provisions of the Act as to preference have been infringed. So far as defeating and delaying a creditor is concerned, that is often the inevitable result of preferring a favoured creditor—a thing that could legally be done at common law, and under the Statute, 13 Eliz. c. 5—but the special provisions of R. S. O. c. 118, which differ it from and extend it beyond the Statute of Elizabeth, are those relating to preference.

Now, the title of the Act shows what is struck at. It is the *fraudulent* preference of creditors by persons in insolvent circumstances. The preference must be an act of fraud on the part of the debtor with intent to prefer one creditor to another out of his goods. Here the Judge has not found fraud, nor do I think it is to be inferred from the position of the parties.

A creditor holding ample security is not a creditor who requires protection within the scope of R. S. O. c. 118. The creditor who is thus secured on land (as in this case) has been provided for by compact between him and his debtor; and it would not seem unreasonable that as against the secured creditor the debtor should be allowed to secure another creditor out of his goods, for that is not done at the expense of the former, nor is the debtor as to the former to be deemed in insolvent circumstances. If, as is urged here, the security is or may be scanty, that is a point to be established by evidence. If the defendants are in truth insufficiently secured, they may be creditors who can invoke the Act for the amount of the deficiency. If the defendants seek to show this a new trial may be proper upon payment of costs, otherwise the judgment should be affirmed with costs.

FERGUSON, J., concurred.

Afterwards the issue was again brought down to trial on March 30th, 1885, at Hamilton, before Boyd, C. The defendants proved their security to be insufficient, and judgment was given in their favour.

A. H. F. L.

[CHANCERY DIVISION.]

WRAY V. MORRISON ET AL.

*Injunction—Owners in severalty of halves of a house—Implied grant—
Natural right of support.*

In 1883 M. W. being seized of certain lands, conveyed half thereof to G. W. in fee, describing the same by metes and bounds, and afterwards died having devised the other half to M. There was a house on the lands in question so situate that half of it was on the portion granted to G. W., and half on the portion devised to M. No specific mention of the house was made either in the deed to G. W. or in the will. M. now commenced, in defiance of G. W.'s protests, to pull down the half of the house situate on the land devised to her, and G. W. applied in the present action for an injunction to restrain the same.
Held, that he was entitled to the relief claimed.

THIS was an action brought by George Wray against Sarah Jane Morrison and Hugh Morrison, her husband, claiming an injunction under the following circumstances :

On August 3rd, 1883, Margaret Wray being seized of the land in question, conveyed one-half of it by metes and bounds to her husband, the present plaintiff, retaining the other half. On the land there was a house having a twenty feet frontage, and so situate that ten feet of the said frontage was upon the half of the land conveyed to the plaintiff, and ten feet on the half retained by Margaret Wray. In September, 1884, Margaret Wray being so seized of half the said land, died, leaving a will whereby she devised all her property, real and personal, to the defendant, Sarah Jane Morrison. At this time there was in occupation of the house as tenant one Carruthers, who had been placed in occupation thereof by the plaintiff, with the acquiescence of his wife, and who had always paid his rent to the plaintiff. After Mrs. Wray's death, however, the defendants not only served Carruthers with a notice to quit the house, but also made threats that the house would be cut in two, and at last, in January, 1885, they sent workmen who commenced removing the weather-boarding on the side of the house, which was on the half of the land devised to the female defendant, causing the plaintiff to apprehend

that they would destroy the house unless restrained. The defendants also caused a board fence to be put up behind the house, along the dividing line between the half of the land belonging to the plaintiff, and the half devised to the female defendant, thus dividing the back premises of the house into two parts.

On January 14th, 1885, the plaintiff commenced this present action, claiming, in the words of the endorsement on the writ, "an injunction restraining the defendants or either of them, their servants, workmen, or agents, from damaging, dismantling, pulling down or otherwise injuring a certain house" (being the house in question), "and from forcibly interfering with the tenant of the said house in respect of his occupancy of the same, and also for a mandatory injunction ordering and commanding the defendants forthwith to remove a certain fence" (being the fence above mentioned) "wrongfully erected by them or by their orders in the rear of the said premises, and also ordering and commanding the defendants or one of them to make good the injury and damage already by force and wrong done by them to the said house, or in the alternative for an inquiry as to the amount of damage so done by them to the said house, and payment by them of the amount due in respect of the said damages when ascertained.

On February 3rd, 1885, the plaintiff moved for an interim injunction in the above terms, and by consent of counsel the motion was turned into a motion for judgment.

A. H. F. Lefroy, for the plaintiff. There can be no doubt that the property in the half of the house passed to the plaintiff with the conveyance of the half of the land: *Quicquid plantatur solo, solo cedit*: *Broom's Legal Maxims*, 4th ed., p. 382. This being so the plaintiff is entitled to the support of the other half of the house: *Richard v. Rose*, 9 Exch. 218; *Pierce v. Dyer*, 109 Mass. at p. 376. Besides, the defendants are bound by the maxim *sic utere tuo ut alienum non lædas*. Again, when Margaret Wray conveyed to the plaintiff the half of the house she impliedly

granted him all easements and quasi easements in respect to the half retained by her necessary to the reasonable enjoyment of it: *Wheeldon v. Burrows*, 12 Ch. D. 31. Perhaps the defendants might have had a partition or sale of the house. *Turner v. Morgan*, 8 Ves. 143, 11 Ves. 157 is a case where a single house was partitioned.

Tilt, Q.C., for the defendants, cited no cases.

February 3rd, 1885. FERGUSON, J.—The motion was for an interim injunction restraining the defendants or either of them, their or either of their servants, &c., from damaging, pulling down or otherwise injuring a house in the city of Toronto known as Number One, Wilton street, and from forcibly interfering with the tenant, &c. By consent of counsel on both sides and under the provisions of Rule 823, the motion was turned into a motion for judgment.

The action was brought for the purpose of obtaining a perpetual injunction of the character above mentioned, and a mandatory order for the restoration of the premises by making good injuries alleged to have been done to them, and for the removal of a fence erected by the defendants. It was admitted that the title to the lot was in Margaret Wray (who was the wife of the plaintiff) after a certain deed of conveyance to her made in the year 1878; that in the year 1883 she conveyed one-half of the lot to the plaintiff, and that she devised the other half of the lot to the defendant, Sarah Jane Morrison. She died in the year 1884. The conveyance to the plaintiff was a conveyance of the half lot by metes and bounds.

The house in question stood upon this lot, one-half of it being upon the plaintiff's half of the lot, and the other half upon the defendant Sarah Jane Morrison's half; that is to say, the house was erected on the middle of the lot, and the boundary line between the two halves of the lot passed through the middle of the house. The plaintiff is, and he has for some time been in possession of the house by his tenant. The defendant had threatened to pull down the half of the house that is upon the land of the female de-

fendant, and apparently in execution of such threats sent a mechanic to the place, who commenced removing or taking off the weather-boarding upon the side of the house which is upon the land devised to the defendant Sarah Jane Morrison. It is stated in the defendants' affidavits that this was only for the purpose of examining the building to see if it could be, that is, the half of it could be conveniently removed; but the plaintiff assumed, and I think reasonably so, that this was a commencement to carry out what had been threatened, namely, pulling down this half of the house, which would no doubt be a very great injury to and to the user of the other half of it.

The admissions that were made by counsel were for the purpose of this suit only, and the question argued was as to whether or not, under such circumstances, the defendants were justified in removing or destroying the half of the house that stands upon the lands of the female defendant, regardless of what the consequences might be to the half that stands upon the plaintiff's lands, the occupation of the house being as before stated.

There can, from the evidence, and what was stated by counsel, I think, be no doubt that the removal of one-half of the house in question would be destructive of the other half, which is, I think, on the admissions, to be considered as undoubtedly the plaintiff's property.

Since the argument I have examined the authorities referred to, and I think they support the contention of the plaintiff's counsel. I think the language of Chief Baron Pollock, and the decision in the case *Richards v. Rose*, 9 Exch. 218, are stronger in favour of the plaintiff than is necessary to support his contention, and I am of the opinion that he (the plaintiff) is entitled to succeed and to have judgment in his favour. It seems to me quite clear that the defendants have not the right to take away one-half of the house in question, and so let the other half of it, which is upon the plaintiff's land, fall into ruins unless it were in some way immediately protected by the plaintiff, even if this could be done.

I think the plaintiff was entitled to bring his action as he did, and there having been the threats made he was not obliged to wait to see how much mischief the defendants might do before bringing his suit. It might then be quite too late for the purpose of an injunction. I also think that the injury reasonably apprehended would be an injury to the plaintiff's reversion, and that he is in a position to sustain this suit notwithstanding the fact of the house being at present let to a tenant who is in occupation of it.

The defendants may have a right to get possession of the half of the house which is upon the half of the lot devised to the female defendant, but that is a matter with which I have here no concern, and for this reason I offer no suggestion or opinion in regard to it.

The plaintiff is, I think, entitled to an order for a perpetual injunction, and an order for restoration, &c., but I think this order should not embrace the removal of the fence mentioned in the notice of motion. The plaintiff's counsel did not consider this a very important part of his case, and did not, after I let fall a remark respecting it, strongly insist upon it. I also think that the plaintiff should be paid his costs, which I am glad to say will not, owing to the course taken by counsel, be very large. The property is not valuable, and it is well that the costs will not be a large sum.

Judgment accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

MACDONALD V. MCCALL ET AL.

Creditors' suit—Chattel mortgage void against creditors—Pressure—Simple contract creditors—Assignment for benefit of creditors—Suit on behalf of all creditors except the preferred ones—Parties—Locus standi.

McC. & Co., creditors of C., knowing him to be insolvent, persuaded him to give them a chattel mortgage on all his property, by representing to him that, if he gave it, it would protect him against his other creditors, and that they would also protect him, and would not enforce the mortgage unless his other creditors took proceedings against him.

Held, on action brought by certain simple contract creditors of C. on behalf of themselves and all his other creditors, that the chattel mortgage must be set aside as a fraudulent preference, and that the doctrine of *pressure* had no application to the case.

Held, also, that the fact that the plaintiffs excluded McC. & Co., from the creditors on whose behalf they were suing, was not a valid objection to the action.

Held, further, that the fact that the plaintiffs were simple contract creditors only, and that the mortgagor had, prior to action brought, made an assignment for the benefit of creditors generally, and that the plaintiffs were not attacking the assignment as well as the mortgage, did not debar them from the relief claimed.

Meriden Silver Co. v. Lee, 2 O. R. 451, followed.

THIS was an action brought by John Macdonald, Sampson Kennedy & Gemmel, Tait Burch & Company, Jennings & Hamilton, Simpson Robertson & Simpson, and McKinnon Proctor & Company, suing on behalf of themselves and all other creditors of the defendant, Joseph Rouse Cox, other than the defendants, D. McCall & Co., against the defendants D. McCall & Co., Joseph Rouse Cox, and John Ferguson, claiming to have a certain chattel mortgage made by the defendant Cox in favour of D. McCall & Co., declared to be fraudulent and void as against the plaintiffs, and the said other creditors, and set aside and cancelled, and for further relief. This action was commenced by writ issued on May 15th, 1884.

The facts of the case are fully set out in the judgment.

The action was tried on December 19th, 1884, and January 7th, 8th, 9th, and 10th, 1885, before Ferguson, J., at Toronto.

B. B. Osler, Q.C., and *Bull* for the defendants, other than the defendants *Ferguson* and *Cox*. We take the preliminary objection to the *locus standi* of the plaintiffs on the ground that this is an action to set aside a chattel mortgage for fraud, in a case where the mortgagor has since made an assignment for the benefit of creditors generally, and submit that the plaintiffs, as simple contract creditors, cannot get on in this action, inasmuch as they admit the goodness of the assignment, and therefore cannot be hindered in their remedy: *Hepburn v. Park*, 6 O. R. 472. The plaintiffs cannot do for the assignee for creditors, what he cannot himself do: *Stuart v. Tremain*, 3 O. R. 190; *Purkes v. St. George*, 21 C. L. J. 158. The plaintiffs might have attacked both the assignment and the mortgage, but they did not take this position, and so were clearly out of Court. We also object that the suit is defective, inasmuch as *McCall & Co.* are not parties plaintiffs: the suit being on behalf of all the creditors, must be on behalf of all without exception: *Longeway v. Mitchell*, 17 Gr. 190.

The learned Judge determined to go on with the taking of the evidence, subject to the above objections.

The evidence having been taken.

S. H. Blake, Q. C., *J. K. Kerr*, Q. C., and *Macdonald*, for the plaintiffs. *Cox* was insolvent at the time of the mortgage complained of, and thus the *onus* is on the defendants to shew that all was fair. See *Brayley v. Ellis*, 9 A. R. 565; *The Merchants Bank of Canada v. Clarke*, 18 Gr. 594; *Morton v. Nihan*, 5 A. R. 20. The demand note for \$4,500 was given for a fraudulent purpose. The object was the same as in the old confession of judgment. Secrecy is a badge of fraud: *Twyne's Case*, 1 Sm. L. C. 8th ed., p. 1. The mortgage impeached satisfies the very words of the statute R. S. O. c. 118. As a preference it could not stand under the statute 13 Eliz. c. 5 alone, because it was an assignment of the man's solvency altogether. The mort-

gage was a cloak or shield, and not a security. It was made upon promises not mentioned in the deed, and not performed. When it is attacked for fraud, the parties are held to the *expressed* consideration: *Freeman v. Pope*, L. R. 5 Ch. 538. The fraud being proved, the previous promise or compromise cannot help the defendants: *Ex parte Cooper*, 10 Ch. D. 313; *Ex parte Fisher*, L. R. 7 Ch. 636; *Ex parte Hauxwell*, 23 Ch. D. 626. There was no real pressure in this case. The dominant idea was to prefer McCall & Co., and they must have known that this was what they were asking. An advance, a pre-existing agreement, and pressure, are only elements in the case, and there may be a finding of intention to defeat creditors notwithstanding each or all of them. We further refer to *Douglass v. Ward*, 11 Gr. 39; *Ball v. Ballantyne*, *ib.* 199; *Ex parte Burton*, 13 Ch. D. 102; *Ex parte Reader*, 20 Eq. 763; *Ex parte Wheatley*, 45 L. T. N. S. 80; *Ex parte Hall* 19 Ch. D. 580; *Ex parte Hill*, 23 Ch. D. 695; *Ex parte Griffith*, *ib.* 69; *Re Maddever*, 27 Ch. D. 523; *Murtha v. McKenna*, 14 Gr. 59; *Hooper v. Smith*, 1 W. Bl. 441; *Re Chaplin*, 26 Ch. D. 319; *Ex parte Johnson*, L. R. 26 Ch. 338; *Kalus v. Hergert*, 1 A. R. 75.

B. B. Osler, Q.C., and *Bull*, for the defendants, other than Cox and Ferguson. The law is, that the creditor can by bill of sale or chattel mortgage, or by suit (except for the Creditors' Relief Act) take all the goods of the debtor. This is the law of the land. The mortgage in question is not a sham; there was a good debt for the amount: *Stuart v. Tremain*, 3 O. R. 190; *Whitney v. Toby*, 6 O. R. 54; *McRae v. White*, 9]S. C. R. 22. McCall & Co. had a perfect right to take the demand note: *Macdonald v. Crombie*, 2 O. R. 243; *Turner v. Lucas*, 1 O. R. 623. The plaintiffs are driven to say that there was a scheme from the beginning to defeat and delay the other creditors, but as a matter of fact there is no appearance of fraud in anything that was done up to the date of the giving of the mortgage. The scheme was to pay everybody in full and not to defeat anybody. The mortgage again was not

given for the whole of what was due to McCall & Co., yet would it not have been if fraud had been intended? As to the objection that the mortgage does not truly represent the debt, see *Tidey v. Craib*, 4 O. R. 696; *Farlinger v. McDonald*, 45 U. C. R. 233; *Parkes v. St. George*, 2 O. R. 342, 21 C. L. J. 158. This case does not fall under the authority of *Morton v. Nihan*, 5 A. R. 20, and *Merchants Bank of Canada v. Clarke*, 18 Gr. 594. We also refer to *Bingham v. Bettinson*, 30 C. P. 438; *National Mercantile Bank v. Hampson*, 5 Q. B. D. 177; *Martin v. Bearman*, 45 U. C. R. 205.

Foster for the defendant Ferguson.

S. H. Blake, Q. C., in reply. As to *Whitney v. Toby*, 6 O. R. 54, there was no document to be excused. If it had lain on the defendants to excuse their conduct, the judgment would have been the other way. There, too, the debtor did not get a portion of the money. Subsequent decisions have modified *Whitney v. Toby*, *supra*. As to the preliminary objections to the suit, all parties are substantially before the Court, and the whole matter can be worked out. But the true way of suing is as in this action: *Calvert on Parties*, p. 24, 32, 33; *Fraser v. Cooper*, 21 Ch. D. 718; O. J. A. rr. 98, 103a. See also *Kitching v. Hicks*, 6 O. R. 739.

February 17th, 1885. FERGUSON, J.—The action is for the purpose of setting aside a chattel mortgage made by the defendant Cox in favour of the defendants McCall & Co., bearing date the 22nd day of March, 1884, upon all the stock-in-trade and all other property of the defendant Cox to secure the payment of the sum of \$5,000, as being fraudulent and void as against creditors.

The plaintiffs are merchants carrying on business in the city of Toronto, and so also are the defendants McCall & Co. They were and are all creditors of the defendant Cox, who carried on business as a merchant in the town of Chatham. The plaintiffs sue on behalf of themselves, and all other the creditors of the defendant Cox, except-

ing the defendants McCall & Co. They, the plaintiffs, have not, nor has any of them, obtained a judgment or execution against the defendant Cox. The plaintiffs are respectively simple contract creditors merely.

The defendant Cox commenced business in the year 1883. He began by purchasing the stock-in-trade of one Lamonde, in Chatham, said to have been at the time of the purchase a stock of about \$10,000, for which he was to pay \$6,850, the sale and purchase were at, I think, 60c. in the \$. He had \$1,000 in money which he paid on the purchase, the terms of which were one-third cash, and the balance on notes at two, four, and six months, with interest at seven per cent. per annum. Lamonde was indebted to the defendants McCall & Co., and there was a balance coming to them after the sale of his goods which they were not likely to be paid. Cox, in his evidence, says that Blakely, one of the members of the firm of McCall & Co., advised him to make the purchase of the stock and that firm endorsed his notes for the balance of the purchase money, that is, as I understand, notes or a note to obtain the required sum to make up the one-third of the purchase money to be paid in cash and the notes that were given at two, four, and six months respectively, and they were to be paid for the endorsation by Cox ten per cent. upon the \$6,850. Shortly stated this appears to have been the defendant Cox's commencement in business in Chatham, in January, 1883. According to his own account of it his business, after the first few months, was not a prosperous one, but the reverse of this. He was able, as he said, to produce from time to time balance sheets showing a considerable balance in his favour, but it appeared to me that the amount of such balance depended largely upon the value he placed upon the stock that he had purchased at 60c. in the dollar. On one occasion he said he put it (what he then had of it I suppose) at 100 cents in the dollar, and on another occasion at a less figure.

In December, 1883, he says the defendants McCall & Co., who had been advancing for him, asked him for and obtained his promissory note payable on demand for the sum of \$4,500. He says that at this time they already had, so far as he knew, his notes for all his indebtedness to them. He says that they, McCall & Co., told him they wanted security, that they wanted this note for \$4,500 so that in the event of anything "turning up" they would have it, that they did not want to use it unless outside matters were pressing him, and that having that "security" they would be able to help him if anything "turned up." He says that this note was not to be discounted, that it was not to be used unless outsiders pressed him, that he thought no more about it after he had given it, and that he said nothing about it to any of his other creditors.

In January, 1884, Cox came to Toronto and consulted with the defendants McCall & Co. about his affairs. He says that he had found that he was in a "tight fix," that the interest charged by the bank was hard on him, that he wanted to do something to save interest, that he did not want McCall & Co. to be helping him so much as they were, and that he mentioned an "*extension*." He says this was the only thing that could be done. He says: "We" (McCall & Co. and himself) had spoken of a deed of extension, and Blakely (who was a partner in that firm) said that it had better be legally done, and that the deed was drawn up in a solicitor's office. Notes were given for the instalments according to the extension contained in the deed to some of the creditors, though it was said that the deed did not, according to its own terms, become operative or effectual. McCall & Co. did not take the extension notes as other creditors did. Cox says they said they would waive their right to these notes, and that they would help him in the future as they had done in the then past.

It appeared that one set of extension notes (as they were called) was paid to the other creditors, to whom they had been given. It was alleged that McCall & Co. had

paid these. There was, however, evidence shewing that some of the money for this purpose came from the defendant Cox. It did not appear with accuracy how much or what proportion of it came from him, but I do not think this material.

Mr. Kerr, the solicitor and agent of McCall & Company, went from Toronto to Chatham in the month of March, 1884, for the purpose of getting further security from Cox. He met Cox there, and after speaking of other matters (as the evidence shews) and of other kinds of security, proposed that a chattel mortgage should be given. To this Cox objected, saying (amongst other things) that it would be an injury to his business. Kerr, however, finally told him that the chattel mortgage, if he gave it, would protect him against all his creditors but McCall & Co., and that they would protect him. Cox, in his evidence, says: "I was told by Kerr that the mortgage would protect me from all my creditors but McCall & Co., and that they would protect me." It appears plainly that it was upon this consideration, or for this reason that Cox agreed to give, and did give the mortgage, for he says the mortgage was given on the faith of the statement made by Kerr. It also appears that Cox at the same time and as (in a sense) part of the same transaction, sought to secure protection against the other creditors in respect of a claim that he said his wife had against him in part for money lent and in part for wages, the whole amounting to some \$915. He says "I spoke of this to Kerr. I suggested that \$500 as wages for her, and the \$415 lent money should come next after the chattel mortgage. I said if he (Kerr) was getting security for McCall & Co., in the happening of an event, I should have security for Mrs. Cox in the happening of the same event," and thereupon a plan was adopted whereby a suit was to be brought in the name of one Smith for the benefit of Mrs. Cox, for the amount of the alleged claim, Mr. Kerr suggesting the name of a solicitor to appear to the writ in the suit, and Cox signing a retainer to him so to do, and giving Kerr a note for \$500, and one for \$415, on which to bring the suit.

The mortgage was given on the 22nd of March, 1884. The affidavits attached to it were sworn on the 24th of March, and on the same day a writ was issued in the name of Smith (who was a clerk in the office of McCall & Co.) against Cox on the two notes for the \$915, and also a suit by McCall & Co. upon the note for \$4,500 given in December, payable on demand. These suits were proceeded with to judgment. It was, however, said that nothing is now claimed in respect of these judgments or either of them. (The Creditors' Relief Act came into force by proclamation, I believe, on the 25th of March, 1884.)

Cox also says that Kerr told him there was no intention on the part of McCall & Co. to force the mortgage unless other creditors took proceedings against him. This was parcel of the arrangement. The evidence shows, I think, clearly, that from the time that Cox said he was in a "tight fix" his affairs did not become any more healthy, but on the contrary, became continually worse till the 2nd day of May, 1884, when he made a general assignment for the benefit of creditors to the defendant Ferguson, who took possession on the following day.

A very large volume of evidence was given at the trial—I do not at all say unnecessarily in a case of this kind—but in the view that I take of the case it will not be necessary for me to refer to it at any greater length here.

A preliminary objection was taken and urged as to the frame of the suit. It was said that when a simple contract creditor brings a suit to set aside a conveyance he must sue on the behalf of himself and all other creditors, and that the exclusion by the plaintiffs of McCall & Co., who were creditors, was fatal to the action.

At the time I ventured the opinion that it was a matter of class representation, and that the plaintiff could not represent McCall & Co., whose interests in the suit were directly antagonistic to those of the plaintiffs, ruling for time being against the objection. The same objection was, however, renewed at the final argument.

The case of *Preston v. The Grand Collier Dock Co.*, 11 Sim. 327, was a case in which a bill was filed by a member of a numerous company (incorporated) on behalf of himself and all the other members, except the defendants, praying that a transaction in which the defendants had been the actors, but which had been sanctioned immediately at a meeting of the company might be declared fraudulent and void. There was a demurrer to the bill. The ground as to parties was especially taken. See page 336 of the report, but the bill was sustained.

In *Foss v. Horbottle*, 2 Ha. 461, the bill was somewhat similarly framed. It was demurred to. The demurrer was sustained, but not on this ground.

I do not say that these cases are precisely in point with the present case, but they confirm me in the opinion that I formed and expressed at the trial, an opinion to which I think I should have adhered, even if I had not found any authority on the subject. I am of opinion against the objection.

There was also another preliminary objection, which was renewed at the final argument, namely, that a simple contract creditor could not sustain a suit to set aside a chattel mortgage for fraud, in a case where the mortgagor had made an assignment for the benefit of creditors generally: that the simple contract creditors—the plaintiffs in this case—could not sustain the suit, as they did not attack the assignment as well as the mortgage. In support of this contention the cases *Hepburn v. Park*, 6 O. R. 472; *Stuart v. Tremain*, 30 O. R. 190, and *Parkes v. St. George*, in the Court of Appeal, but not reported were mentioned (see 21 C. L. J. 158) (a). In the case *Meriden Silver Co. v. Lee*, 2 O. R. 451, the decision of the Chancellor seems plainly against this objection. In the case *Hepburn v. Park*, 6 O. R. 472, Mr. Justice Osler says: "But I cannot help saying that if I had to dispose of the case on the other point I could not follow the case *Meriden Silver Co. v. Lee*, 2 O. R. 451." The Court of

(a) Since reported, 10 A. R. 495.

Appeal did not, as I recollect the judgment, dispose of the question in *Purkes v. St. George*. The Court there dealt only with a case in which there was no fraud. In a case lately decided by Mr. Justice Proudfoot, *Powell v. Calder*, 21 C. L. J. 78 (Book No. 54, p. 286,) the chattel mortgage was dated July 3rd, 1884; the assignment for the benefit of creditors, the 23rd of July, 1884, the execution and seizure, were on the 28th of July, 1884. The trial was of an interpleader issue, and the learned Judge, holding that the chattel mortgage was fraudulent, decided in favour of the execution creditor. I do not perceive that the judgment in the case *Stuart v. Tremain*, 3 O. R. 190, is in point or affects the consideration of the question raised by the objection.

Such being the state of the recent authorities, so far as I have seen or been referred to them, I think my proper course is to adopt the decision of the Chancellor in the case *Meriden Silver Co. v. Lee*, it being a decision on the point. What Mr. Justice Osler said regarding it, no matter how highly respected as dictum, appears to me to be dictum only. My conclusion is, therefore, against the objection.

Then as to the merits of the case. The tenth paragraph of the statement of claim is as follows: "At and prior to the said 22nd day of March (the date of the mortgage impeached) the defendant Cox was in insolvent circumstances, and unable to pay his debts in full, and the said mortgage was made by him with intent to defeat and delay his creditors, and with intent to give the defendants D. McCall & Co. a preference over the plaintiffs and his other creditors, and the said defendants D. McCall & Co. accepted said conveyance with intent to defeat and delay said creditors, and with intent to obtain a preference over them."

I am of the opinion that the evidence fully proves this statement. The parts of the evidence that I have referred to are not by any means all the evidence bearing on this subject. The defendant Cox was a witness adverse to the

plaintiffs. The testimony he gave was to a large extent extracted by an examination that was in kind a cross-examination, and I think the plaintiffs are entitled to the full benefit of it. I think it is placed beyond all reasonable doubt that he was, at and before the time of the making of the mortgage, in insolvent circumstances and unable to pay his debts in full, and that this was a fact well known to him and also to the defendants McCall & Co., the mortgagees. It was contended, on the part of the defence that there was "pressure," and that because the proposal came from the mortgagees (through their agent) and did not originate with Cox the mortgagor, the doctrine of "pressure" must be applied as in *Whitney v. Toby*, 6 O. R. 54; and on the ground stated by Mr. Justice Patterson, in *Davidson v. Ross*, 24 Gr. at p. 64, where he gives his understanding of the grounds of the decisions respecting pressure, where he says: "The transaction is not voluntary if it originates in the will of the creditor at whose instance it is done, and not in the will of the debtor, who only yields to the solicitation of his creditor, and it is not done with intent to prefer, &c., if the motive is to escape the pressure which is exercised, or even to comply with a *bond fide* demand which is made, and not to prefer one creditor to another, even though that may be the necessary and obvious effect of what is done." Other and later cases were referred to on this subject. It was on the other hand contended that the doctrine of "pressure" had undergone some modifications by decisions since the time at which *Whitney v. Toby* was decided, but I do not at all think it necessary to refer here to those decisions, because I do not think that the facts in this case are like those in *Whitney v. Toby*, where the solicitation or proposal came from the creditor, and was simply yielded to by the debtor, without more.

Here the proposal coming from the creditor was not yielded to by the debtor Cox, in that way at all, he objected to it, and did not give his assent to the transaction until he was told that it would protect him against all his credi-

tors but McCall & Co., and a promise given to him that they would protect him, which I think meant they would protect him by means of the mortgage, if occasion should require, for the mortgage was not to be used by them unless the other creditors became troublesome to the debtor. It was with this idea that the debtor fell in and concurred, and it was upon this consideration and for this purpose and for the purpose of preferring McCall & Co. to the other creditors that he executed the mortgage, he himself then and there making the proposal that the alleged claim of his wife should also be protected against the claims of the other creditors, and that she should also be preferred and come next after the claim of McCall & Co., and becoming a party to a plan then devised for the purpose of carrying this into effect, although it ultimately failed of success. I think the evidence of the debtor taken from him as it was taken, in connection with the circumstances and facts that undeniably took place stronger than the recollection, or want of recollection of the other witness on the immediate subject. I think that the evidence that bears upon this part of the case shows that a compact was entered into, the intent of which was, to ward off, to hinder and delay the other creditors (this being one of the purposes which, according to the understanding, the mortgage was to serve) and to prefer the defendants, McCall & Co., to these other creditors, and that the transaction of the mortgage in question was made with this intent on the part of both parties to it, both then being fully aware that the debtor was in insolvent circumstances and unable to pay his debts in full.

I think the transaction has been shown to have been tainted with both the iniquities mentioned in the statute, and that although the proposal that the mortgage should be given came from the creditor there was not *pressure* that induced the giving of the security, there was not a simple yielding to the proposal or importunity of the creditors. The purposes the mortgage was to serve were stated. These were the purposes I have referred to above,

and I venture to think that the doctrine of *pressure* has no application to the case. I am of the opinion that the mortgage cannot be upheld, and that the plaintiffs are entitled to a judgment in their favour. What the plaintiffs ask is, that the chattel mortgage should be declared to be fraudulent and void as against them and the other creditors of the debtor, that it should be set aside and cancelled, and that it should be declared that the defendants McCall & Co. are not entitled to the goods and chattels thereunder or the proceeds thereof. To this relief I think the plaintiffs are entitled, and I think they are entitled to be paid their costs by the defendants, other than the defendant Ferguson. I also think the defendant Ferguson should be paid his costs by the defendants other than himself. The costs of the injunction motion should also be paid by the defendants, other than the defendant Ferguson, (a).

Judgment accordingly.

A. H. F. L.

(a) See 48 Vic. ch. 26.—R&F.

[CHANCERY DIVISION.]

HUGHES V. REES ET AL.

Pleading foreign judgment—Master's office—Estoppel—Foreign judgment for alimony—Husband and wife—Expenses incurred by trustee under invalid trust deed.

This action as originally brought was to take the plaintiff's accounts under a postnuptial settlement, in which the plaintiff and the defendant D. J. R. were trustees, but after the hearing and before decree, a question was raised by amendment as to the liability of the defendant D. J. R., to pay certain moneys alleged to have been advanced by the plaintiff for the maintenance of his wife and children, and on the argument of this question judgment was given directing a reference as to such claim. Before the argument judgment had been rendered in the Superior Court of Quebec, on the same question in D. J. R.'s favour, and on the reference D. J. R. proved this judgment, contending that it concluded the matter, as being *res judicata*, though not pleaded.

Held, that D. J. R. had had no opportunity of pleading such judgment and that it was therefore conclusive when set up in the Master's Office without being pleaded.

Held, also, that a foreign judgment for alimony, put an end to any implied liability on the husband's part to pay for his wife's maintenance subsequently to the date from which alimony was to be paid under such judgment.

Seem, that though the trust deed in question was invalid, and not withstanding *Smith v. Dresser*, L. R. 1 Eq. 651, 35 Beav. 378, yet as against one who himself assisted in creating the trust, a trustee acting under it would have been entitled to expenses incurred in respect of it; but upon the facts stated below, it was held that the sums claimed were not shewn to have been incurred in respect of the trust deed.

In this case a reference was made to the Master-in-Ordinary to enquire and state whether the plaintiff had any valid claim against the defendant D. J. Rees, for the maintenance and support of the said defendant's wife and children, and also whether the plaintiff had been put to any other expenses in respect of the supposed trust deed which by the judgment was declared invalid.

The case is reported in 5 O. R. 654.

The action was originally instituted to take the plaintiff's accounts under a postnuptial settlement in which the plaintiff and defendant D. J. Rees were trustees, and for the appointment of a new trustee instead of the said defendant.

During the proceedings in this Court the plaintiff brought another action against the said defendant in the Superior

Court of the Province of Quebec to recover certain moneys paid by him for the support and maintenance of the defendant's wife and children.

The Quebec Court on February 25th, 1882, decided adversely to the plaintiff, and held that the said defendant was not liable to the plaintiff for the moneys claimed, on the grounds set forth in the report of the case in 5 Legal News 70.

On September 15th, 1882, after the judgment of the Quebec Court, this action, which had been tried before Ferguson, J., at the Toronto Sittings on December 20th and 21st, 1881, came on for judgment, when the plaintiff made application to stay the issue of the judgment to enable him to argue certain questions as to the liability of the said defendant to pay certain moneys alleged to have been advanced by the plaintiff for the support and maintenance of the defendant's wife and children.

The argument on the question of the defendant's liability to repay these moneys to the plaintiff, which, as appears from the papers filed, was the same question as that in issue between the plaintiff and defendant in the Quebec Court, came on to be heard before Ferguson, J., on the 3rd of March, 1883, over a year after the Quebec judgment, and on the 7th of March, 1883, judgment was given directing the above reference, and in view of it giving the plaintiff liberty to amend his bill of complaint as he might be advised, making such amendments on or before the 10th of September, 1883.

The plaintiff thereupon amended his bill of complaint claiming that the said defendant was liable to him for the moneys he had advanced, as above stated, for the support and maintenance of the said defendant's wife. No reference appears to have been made to the Quebec judgment on the application for this amendment.

When the parties came before the Master-in-Ordinary the defendant filed an exemplification of the Quebec proceedings and judgment, and contended that the question of his liability to the plaintiff for the moneys, now claimed as having been advanced for the defendant's wife, was *res judicata*.

The Master held, that as the defendant had not pleaded the Quebec judgment, it could not operate as an estoppel; that having been rendered on the 25th of February, 1882, the defendant could have used it against the plaintiff's subsequent applications of the 15th of September, 1882, and 3rd of March, 1883, for leave to enforce the same claim against the defendant in this action, or he could have applied on the two occasions referred to for leave to plead this Quebec judgment as an estoppel: that the defendant, by neglecting to apply when he had the opportunity of doing so, had thereby waived his right to insist upon the estoppel, and could not now assert it in the Master's office; and that the question was therefore at large, to be enquired into upon the whole evidence. He also held, under the second branch of the reference, that the plaintiff was entitled under the trust deed to be reimbursed out of the trust fund for certain legal and other expenses incurred by the defendant's wife, and for which the plaintiffs on the faith of the trust deed, had become responsible.

The Master's judgment is reported at 10 P. R. 301, and 20 C. L. J. 343.

The defendant D. J. Rees appealed from the Master's report on the following grounds:

1. The said Master refused to receive as evidence on behalf of the defendant D. J. Rees a judgment in the Superior Court of Lower Canada, dated February 25th, 1882, in a certain action wherein the plaintiff in this action and one B. B. Hughes were plaintiffs, and the defendant D. J. Rees was defendant; whereas he should have admitted the said judgment, and should have disallowed the items of the plaintiff's claim from 1 to 52 inclusive.

2. Because none of the items claimed by the plaintiff and allowed by the Master were paid or incurred with the sanction, or approval, or authority, express or implied, of the defendant D. J. Rees.

3. Because the Master should have disallowed all the items of the plaintiff's account from and after No. 45

inclusive, because all the said items were incurred during the separation of Mr. and Mrs. Rees, and subsequent to alimony proceedings under which Mrs. Rees was awarded and continued to receive from her husband an adequate provision for her support and maintenance and that of her children.

4. Because the last mentioned items, or any of them, were not in the nature of expenses or charges in respect of the supposed trust referred to in the said order of reference, and should have been disallowed.

5. Because, upon the evidence before him, including the said judgment, the Master should not have found that there was anything due from the defendant D. J. Rees to the plaintiff, or that the plaintiff had been put to any expenses or charges in respect of the supposed trust in the said judgment mentioned.

6. Because the said Master was wrong in allowing the plaintiff to claim against the dividends received from the trust fund, the subject of the supposed trust deed, any of the payments claimed by him.

The appeal was heard on January 29th, 1885, before Proudfoot, J.

J. MacLennan, Q. C., and R. E. Kingsford, for the appellant, referred to *Smith v. Dresser*, L. R. 1 Eq. 651; *Dobie v. Temporalities Board*, 7 App. Cas. 136.

S. H. Blake, Q. C., and Murphy, for the plaintiff. In *Smith v. Dresser* the attack came from a third person. When leave to amend was given leave to answer was implied, but no answer was put in. The foreign judgment should have been pleaded. See *Bickford v. Grand Trunk R. W. Co.*, 1 S. C. R. 696; *Day v. Brown*, 18 Gr. 681. The Master did receive the judgment as evidence, but not as *res judicata*, or conclusive evidence. As to payments being made without the sanction of the defendant D. J. Rees, that was not necessary: *Griffith v. Paterson*, 20 Gr. 615; *Eastland v. Burchell*, 3 Q. B. D. 432; *Debenham v. Mellon*, 5 Q. B. D. 394; 6 App. Cas. 24. A person coming into

equity must do equity, and a trustee must be fully indemnified. We refer also to *Perry on Trusts*, vol. 2, 2nd ed., sec. 907; *Cunningham v. Buchanan*, 10 Gr. 523; *Story's Eq. Pleading*, secs. 391-398; *Jacobs v. Richards*, 18 Beav. 300; *Story's Eq. Jurisp.*, vol. 1, sec 642, vol. 2, sec. 707; *Beddoes v. Pugh*, 26 Beav. 407; *Lewin on Trusts*, 6th ed., pp. 452, 456.

J. MacLennan, Q.C., in reply. If the Quebec judgment was admissible, it was conclusive; the parties and the subject matter were the same. After a decree for alimony, there is no implied liability to pay for maintenance: *Negus v. Forster*, 46 L. T. N. S. 675; *Lush's Husb. and Wife*, pp. 288-230.

February 18th, 1885. PROUDFOOT, J.—Appeal from the Master in Ordinary.

The case was heard by my brother Ferguson, and his judgment is reported in 5 O. R. 654. The judgment of the Master is reported in 10 P. R. 301. In these judgments all the material facts are stated up to the making of the report.

By his report, made the 23rd of June, 1884, the Master finds that the plaintiff has a valid claim against the defendant Daniel John Rees, for the maintenance and support of the wife and children of the said defendant D. J. Rees, from the 13th day of March, 1877, to the 31st day of March, 1879, and that after giving credit for some payments made by the defendant D. J. Rees, there remained due to the plaintiff \$1638.67.

The Master further finds that the plaintiff has been put to the expenses or charges in respect of the supposed trust in the pleadings mentioned to the amount of \$1066.37, whereof the sum of \$777.37 is for the support and maintenance of the said wife of the said defendant, and the sum of \$289 is for legal expenses incurred by the said wife, and paid at her request by the plaintiff, and such charges and expenses are not included in the sum of \$1638.67, and are for charges and expenses subsequent to the 31st of March, 1879.

The Master certifies that the defendant D. J. Rees tendered as evidence before him a judgment in the Superior Court of Lower Canada dated the 25th of February, 1882, in an action between the plaintiff and one B. B. Hughes against the said D. J. Rees, which action embraced all the items in the plaintiff's account in this action from numbers 1 to 52 inclusive, and that the judgment was in favour of the defendant D. J. Rees, with costs; and D. J. Rees claimed before him the benefit of the judgment as *res judicata* in his favour with respect to the items above referred to, but the Master declined to admit such evidence.

The Master further certified that the defendant D. J. Rees proved before him two judgments in the Superior Court of Lower Canada, dated respectively the 13th day of December, 1879, and the 8th day of June, 1880, in an action by the wife of D. J. Rees against him for alimony, and also proved that the defendant D. J. Rees had since the 1st day of April, 1879, paid to his wife \$1,200 per annum, as alimony for the support and maintenance of the said wife and children of the said D. J. Rees, and he claimed the benefit of that judgment as against the items of the account subsequent to the 1st of April, 1879; and the Master held him so entitled in respect of the account in the first paragraph of the report (*i.e.* the items comprising the \$1,638.67.)

By referring to the account of the plaintiff filed with the Master it appears that the first forty-four items of the account, deducting the forty-fourth and thirty-sixth, which were disallowed, amount to \$1933.17, and deducting payments made by the defendant of \$294.50, leaves the balance due from defendant of \$1638.67, as on 31st of March, 1879.

The items 45 to 52 inclusive are reported by the Master to have been sued for in the Superior Court of Lower Canada, in which judgment was given for the defendant. They amount to \$613.35. They are charged under dates subsequent to the 1st of April, 1879, and are therefore subsequent to the date from which alimony was payable and has been paid.

The \$777.37, for maintenance of the wife, and the \$289 for legal expenses, are certified to have been incurred after the 31st of March, 1879.

The defendant D. J. Rees appeals from the report because the Master refused to conclude the plaintiff by the judgment in the Superior Court, as it had not been pleaded, and that it was not open under the terms of the reference. This judgment covered all the items to No. 52. All the subsequent items are concluded by the decree for alimony.

In considering the subject of this appeal I do not think I can look at the judgment of the learned Judge who heard the case, nor go behind the order of reference, to ascertain what he intended by it, nor as to what took place before him when granting the order. If the order or decree does not express what was intended by the learned Judge, then steps should have been taken to make it conform to his judgment.

The general rule as to the effect of judgments, and the mode of taking advantage of them, is I think correctly stated by the Master, viz., that the judgment of a Court of competent jurisdiction directly on the point is, as a plea, a bar, and as evidence is conclusive between the same parties upon the same matter directly in question in another Court.

But to have this effect it must be pleaded when there is an opportunity of pleading it. If it is not pleaded when there was an opportunity of doing so the party is deemed to have waived the benefit of the estoppel.

Then had the defendant an opportunity of pleading the judgment? The amendment was made on a motion subsequent to the hearing but before the decree was drawn up. And the order giving leave to amend is contained in the decree. The effect of it is to change the whole character of the relief asked by the bill originally, which was to enforce a postnuptial settlement. The amendment gives the plaintiff the benefit of a *quantum meruit* for maintenance of the defendant's wife and children.

The application to amend at the hearing is made under Jud. Act Marg. Rules 178 and 184, the effect of which is, that the amendment may be allowed upon such terms as to costs or otherwise as may seem just.

The right to set up a defence to the amended proceedings must be granted by the Judge. The cases cited in Mr. MacLennan's book (a) shew this to be the uniform course, and the propriety of it is obvious enough, especially where, as in the present case, if the defendant had been granted the liberty of pleading the judgment it would have necessitated a new hearing.

The judgment in this case orders that upon the plaintiff amending his bill as he might be advised, it was referred to the Master to inquire if the plaintiff had any valid claim for maintenance, and if he had to take the account.

There is no provision for allowing the defendant to answer or to set up a new defence, and from the order being for an immediate reference upon the amendment being made, it would appear that the learned Judge did not contemplate any answer being put in.

I am, with much reluctance, led to the conclusion that the defendant D. J. Rees had no opportunity of pleading the judgment, and that he might therefore produce it before the Master as conclusive evidence in his favour.

As to the other ground, the decree for alimony was made on the 13th of December, 1879, the action having been begun on the 2nd of June, and the alimony was to be computed from the 1st of April, 1879. The plaintiff says the items for maintenance of the wife amounting to \$777.37, though paid after the 1st of April, were paid before the decree for alimony was in fact made. This sum does not seem to me to come within the meaning of the reference to inquire "whether the plaintiff has been put to any other expenses or charges in respect of the supposed trust deed," the prior part of the reference being to inquire whether the plaintiff has a valid claim for the maintenance and support of the wife and children. The

expenses and charges must therefore have been other than those for maintenance. But besides this I think that the judgment for alimony must be taken to cover all charges for maintenance subsequent to the time from which it was to be calculated. The sum allowed is that which a Court of competent jurisdiction in Lower Canada has decided to be proper for the maintenance of the wife. I cannot assume that the sum was fixed at \$1,200, by reason of the wife having other means of support, and certainly not that she was entitled to anything under the trust deed, which was void by the law of Lower Canada, nor because she was certain of getting something from the kindness of her brothers. This judgment for alimony must therefore be deemed to have put an end to any implied liability on the part of the husband to pay for the wife's maintenance.

As to the \$289 for legal expenses incurred after the 31st of March, 1879, they are to be such expenses in respect of the trust deed. The items composing this sum are said to be :

No. 36	18 Nov., 1878—Blake & Co. costs	.....	\$20 00
44	18 Mar., 1879— “ “ “	.....	40 00
45	24 April, 1879—Abbott & Co. “	.....	5 00
46	12 July, 1879—Kerr & Carter “	.....	200 00
63	21 Jan., 1881—Mrs. McKeown, expenses to Montreal twice	....	24 00
			<hr/> \$289 00

The Master says the \$289 was all incurred after the 31st of March, 1879, and there may therefore be some mistake in assuming that the first two items form part of it. It was not shown that these expenses were incurred in respect of the trust deed. Indeed Messrs. Kerr & Carter's costs are said to be those incurred by the plaintiff in the suit in Lower Canada, which was decided against him. That was not a suit brought upon or in respect of the trust deed. It was a suit brought for the maintenance of the wife, upon an implied liability to pay for her support. Nor are Mrs. McKeown's expenses shewn to have been on account of the trust. They were incurred in 1881, long after the decree for alimony, and are only said to have been on Mrs. Rees's affairs.

Had these expenses appeared to have been incurred in respect of the trust deed, I would have had no hesitation in allowing them to the plaintiff, notwithstanding the case of *Smith v. Dresser*, L. R. 1 Eq. 651, 35 Beav. 378, for the reason assigned in the argument, if for no other, that the defendant himself assisted in creating the trust, and should not be allowed to deprive the plaintiff of expenses incurred in respect to it.

The appeal as to the whole \$1,066.57 is allowed.

The appeals are therefore allowed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

LESLIE V. CALVIN ET AL.

*Patent—Action against executors for infringement—Saving of expense—
Profits to estate—Actio personalis cum personâ moritur.*

The plaintiff sued the executors of D. D. C. for an account of all profit accrued to the estate of D. D. C., by reason of the user by him of a certain machine made by him in alleged infringement of the plaintiff's patent, which profit consisted in the saving of expense to D. D. C.

Held, on demurrer to the statement of claim, that the plaintiff had no remedy against the executors of D. D. C. in respect of such profit accrued to him prior to his death.

Phillips v. Homfray, 24 Ch. D. 439, discussed, and regarded as decisive in the present case.

Semble, that if the statement of claim could be read to mean that by reason of the wrongful act complained of, property of a tangible character, passed from the plaintiff's estate to that of D. D. C., as distinct from the saving of expense, the conclusion might be different.

THIS was an action brought by William Leslie, the younger, against Hiram W. Calvin and James A. Henry, the executors of the late D. D. Calvin, deceased, claiming, amongst other things, that the defendants might be ordered to account to the plaintiff for all benefit, profit, and advantage accrued to the estate of the late D. D. Calvin, by reason of an alleged infringement by him of a certain patent and invention of plaintiff.

March 30th, 1885. FERGUSON, J.—The action is for alleged infringements of a patent right, of which it is alleged that the plaintiff is the owner. The defendants are the executors of the last will of the late D. D. Calvin. The demurrer is to that part of the statement of claim whereby the plaintiff seeks to recover in respect of alleged infringements by the late Mr. Calvin during his lifetime. No question is raised as to misjoinder as to parties or causes of action. The question appears to be single, and, as was freely stated and admitted upon the argument, is as to whether or not the principle, *actio personalis moritur cum personâ*, is applicable and to be applied under the circumstances disclosed on the face of the pleading demurred to. The plaintiff in effect states that by virtue of letters patent granted to him, bearing date the 10th day of July, 1878, under the patent Act of 1872, and a reissue of the same bearing date the 9th day of July, 1883, he was and is entitled to the exclusive right, and privilege, and liberty of making, constructing, and using, and vending to others to be used in the Dominion of Canada, the invention in the letters described as a "Withe Crushing Machine," for the period of fifteen years from the said 10th day of July, 1878, subject to certain conditions, &c., referred to in the pleading. The pleading contains a description at some length of the invention, the use of and mode of using it, but I do not see that it is necessary that I should state those here. It also states that the conditions were complied with and performed.

It is then stated that after the issue of the letters patent, and while they were in full force and validity, and in or about the year 1879, the late Mr. Calvin, without the authority or license of the plaintiff, made and caused to be made for his own use, and that he did in fact thereafter, down to the time of his death, use for the purposes of his own business of a lumber and timber dealer, rafter and forwarder, a withe crushing machine similar to, in close imitation of, and in principle identical with the machines manufactured by the plaintiff under his said invention and

patent, and that the machine so manufactured by and for the late Mr. Calvin, and so used by him in his said business, was and is an infringement upon the plaintiff's said patent and invention, and that the making and using of the machine; by the late Mr. Calvin was a violation of the plaintiff's rights acquired under the said letters patent; and that the late Mr. Calvin thereby defrauded the plaintiff of the profits which otherwise would have accrued to the plaintiff from the making and selling of the said machine; and that the late Mr. Calvin made and realized large profits from the use of the said machine, and acquired great benefit and advantage from his said infringement of the plaintiff's patent and invention, and that *the estate and effects of the late Mr. Calvin became largely increased thereby.*

It is then alleged that the late Mr. Calvin departed this life in the month of May, 1884, having first made and published his last will, whereby he appointed the defendants the executors of the same; that probate was granted to them, &c., &c. Then follow the statements against the defendant Hiram A. Calvin, with which, however, I have now no concern.

The specific claims made are that the defendant Hiram A. Calvin may be restrained from further using the machine so made and used by the late Mr. Calvin, and that the same may be delivered up to the plaintiff to be destroyed; (2) that the defendants may be ordered to account to the plaintiff for all benefit, profit, and advantage accrued to the estate of the late Mr. Calvin by reason of his said infringement of the plaintiff's patent and invention, and by reason of his making and using the said machine, and, after a claim made against the defendant Hiram A. Calvin, costs of the action. *It will be seen that the alleged infringements by the late Mr. Calvin were during a period a part of which was before and a part after the date of the re-issue of the patent.*

The authorities chiefly relied on by counsel for the defendants were the case, *Phillips v. Homfray*, 24 Chy. D-

439, and the cases and authorities referred to in that case. That case was for a declaration that the defendants were liable in respect of certain coal and ironstone gathered and removed by them from under the plaintiffs' farm; for an account of the coal and ironstone gotten by them from under the farm; for an account of coal and ironstone conveyed from the defendants' own mines through roads and passages under the plaintiffs' farm; and that the defendants might be decreed to pay for the coal and ironstone wrongly gotten by them from under the plaintiffs' farm, at their proper value, and also to pay a way-leave rent or compensation in respect of their user of the roads and passages under the plaintiffs' farm for the conveyance of their own coal and ironstone; and that they might pay compensation for the damage done to the surface of the plaintiffs' farm, and for other relief.

By the decree of the Vice-Chancellor as varied by Lord Hatherley on appeal four enquiries were ordered.

1. As to what quantity of coal, ironstone, and other produce had been gotten or removed as aforesaid. (As to the propriety of this there does not appear to have been any contention afterwards.)

2. As to what quantities of coal, ironstone, and other produce had been conveyed from the collieries and mines of the defendants, or any of them, over or through the roads or passages under the plaintiffs' farm.

3. An inquiry what amount, upon the result of the inquiry last directed, ought to be paid by the defendants to the plaintiffs for way-leave and royalty in respect of the user by the defendants of the roads and passages under the plaintiffs' farm, and

4. Whether the farm and the mineral property of the plaintiffs under it had sustained any, and what, damage by reason of the way in which the defendants had worked under the farm.

After this reference Fothergill, one of the defendants, died, and the suit was revived against the executrix of his will. She moved before Mr. Justice Pearson that all pro-

ceedings under the second, third, and fourth inquiries might be stayed, and the official referee directed not to proceed with them.

This motion was successful so far as it related to the fourth inquiry, but as to the second and third inquiries the motion was refused, and from this judgment the executrix appealed. The result of this appeal was, that the proceedings under the second and third inquiries must also be stayed on the grounds (as stated in the head note of the case) that apart from cases of breach of contract, a remedy for a wrongful act done by a deceased person cannot be pursued against his estate unless property, or the proceeds or value of the property, belonging to another person have been appropriated by the deceased person, and added to his estate. Bowen, L. J., delivered the judgment of Lord Justice Cotton and himself, Baggallay, L. J., dissented. In these judgments, and the judgment of Mr. Justice Pearson, the law upon the subject is very fully discussed, the learned Judges referring to and commenting upon, the earlier cases, and stating the circumstances under which the principle above mentioned has application.

In delivering judgment Lord Justice Bowen said, at p. 454: "The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property belonging to another, has been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value. * * In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrong-doer, could have been recovered from him, can be traced after his death to his assets and recaptured by the rightful owner there. But it is not every wrongful act by which a wrong-doer indirectly benefits that falls

under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. When there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and unascertained, the executors of a wrongdoer cannot be sued because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby." Further on the learned Judge, after referring to a large number of cases (some of a very early date) says, at p. 462: "The difficulties of extending the above principle to the present case" (the one then under consideration) "appear to us insuperable. The deceased R. Fothergill by carrying his coal and ironstone in secret over the plaintiffs' roads took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved his estate expense, but he did not bring into it any additional property or value belonging to another person." Reference is then made to the case *Kirk v. Todd*, 21 Ch. D. 484, 488, which is a case for fouling the water of a stream, and the learned Judge says: "In every case where one man fouls the flow of water to which another is entitled, he probably saves himself expense by so doing. But the benefit to which the Master of the Rolls alludes, appears to us to be some beneficial property or value capable of being measured, followed, and recovered." At the risk of prolixity of quotation I will cite a passage from the judgment of Lord Justice Baggallay as it seems to me to render entirely certain the reasons upon which the judgment of the court proceeded. At page 471 he says: "It has hardly been disputed on the present appeal that a remedy for a wrongful act can be pursued against the estate of a deceased person by whom the act has been committed, where property or the proceeds of property belonging to another have been appropriated by the deceased

person; in other words, that the action in such cases, though arising out of a wrongful act, does not die with the person; but it has been urged that the principle thus enunciated is limited to cases in which property, or the proceeds of property, have been appropriated by the deceased person, and that it does not apply to a case in which the deceased person has derived any other benefit from his wrong doing than property or the proceeds of property, and in particular it does not apply to a case in which the benefit derived has not been in the form of an actual acquisition of property, but of a saving of expenditure which must otherwise have been incurred by the wrongdoer, as in the present case, in which for the purpose of the present argument, it must be assumed that by the use by the defendants, for the carriage of their minerals, of the roads and passages under the plaintiffs' farm, there was a saving to them of an expenditure which, they must otherwise have incurred." The learned Judge then proceeds by saying: "Speaking with much diffidence, as my views in this respect differ from those of my colleagues, I feel bound to say that I cannot appreciate the reasons upon which it is insisted, that although executors are bound to account for any accretions to the property of their testator derived directly from his wrongful act, they are not liable for the amount or value of any other benefit which may be derived by his estate from or by reason of any such wrongful act." This statement of the dissenting Judge seems to leave no room for doubt as to what was the opinion of the majority of the Court on this immediate subject, and that on that opinion they acted in pronouncing the judgment.

It was not suggested that the case is not binding upon me, and I think that it is.

It is a little difficult to me to perceive the entire accuracy of the statement that Fothergill by carrying his coal and ironstone in secret over the plaintiffs' roads took nothing from the plaintiffs in the action. It may be somewhat more difficult to perceive the accuracy of a statement

to the effect that one who by infringing a patent right manufactures and uses the patented invention, and thereby makes or saves money for himself, takes nothing from the patentee; but, be that as it may, I am of the opinion that the decision in *Phillips v. Homfray* must govern my conclusion in the present case.

The statement of claim demurred to alleges, it is true, that the late Mr. Calvin made and realized large profits from the use of the machine manufactured by him in violation of the plaintiffs' rights as patentee, and that he acquired great benefit and advantage from the alleged infringement of the plaintiffs' patented invention, and that his estate and effects became largely increased thereby; but the context shows plainly and beyond all doubt, I think, that the meaning is, that this benefit, this advantage, this increase was simply the saving of expense to him by the use of the machine, this simply, nothing more or less; and it was in this view, on this footing, so to speak, that the case was argued before me. In the judgment in *Phillips v. Homfray*, p. 458, is this passage: "The collocation of these two cases" (referring to two cases which had been cited by the Court) "points to the distinction which we have drawn. The proceeds or value of actual property acquired wrongfully by the testator can be recovered by an executor, but the mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor"

The same idea is repeatedly stated in different language in the judgment, leaving, I think, no doubt that this was the opinion of the majority of the Court, and the opinion on which they acted. This being so, and looking at the meaning I have placed upon the statement of claim demurred to, (the same as that given to it by counsel in the argument) I do not perceive how, although I do not feel entirely satisfied, I can do otherwise than decide in favour of the demurrer. The judgment upon the demurrer will, therefore, be for the defendants, and if it is necessary to mention the matter of costs the judgment will be with costs.

NOTE.—The statement of claim being admitted by the demurrer, if a meaning could, notwithstanding the context, be given to some of the passages in it, which, taken alone, might possibly mean that by reason of the wrongful act property of a tangible character passed from the plaintiffs' estate to that of the testator, so that the part of the statement demurred to would have a meaning different from that which I have placed upon it, and which both counsel agreed in saying was the meaning—in other words, if the meaning could be taken to be that the testator, by the wrongful act, put into his estate some value or property other than and different from *the saving of expense by the use of the machine*, the conclusion might be quite different, but I do not see that such meaning can be given to the statement demurred to.

A. H. F. L.

[CHANCERY DIVISION.]

FERGUSON V. FERGUSON ET AL.

Fraudulent conveyance—Acquiescence by creditor—Action by a subsequent creditor becoming such by endorsing and paying a note made by the grantor prior to the impeached conveyance.

Where one impeached a conveyance of land to M. the wife of K. on the ground that the land was really bought with K.'s money, and was so bought and conveyed to M. at K.'s direction, with the intent of delaying and hindering the plaintiff and other creditors of K., and no fraudulent intent in respect to the said conveyance was proved, and it appeared that the plaintiff was himself consulted with regard to the matter, and knowing all the circumstances of K.'s financial position expressed his approval of what was done, and it further appeared that the plaintiff was not himself a creditor of K. at the time of the impeached conveyance, but only became so subsequently by endorsing and finally paying a promissory note of K.'s representing a liability incurred by K. prior to the impeached conveyance.

Held, affirming the decision of FERGUSON, J., that under these circumstances the plaintiff could not have the deed set aside as a fraud upon him.

THIS was an action brought by Hugh Ferguson against Kenneth Ferguson and Mary Ferguson, in which the plaintiff alleged in his statement of claim, that on December 14th, 1881, he recovered a judgment against Kenneth Ferguson for \$718.29, and on December 22nd, 1881, he placed in the Sheriff's hands writs of *fi. fa.* against the goods and lands of the judgment debtor, the former writ being returned *nulla bona*, and the latter being still in the Sheriff's hands and unsatisfied: that on February 19th, 1879, Kenneth Ferguson, with the intent of defeating, delaying, and hindering him and his other creditors, purchased the property in question with his own money from one Alfred Jewell, and took the conveyance thereof with the intent aforesaid in the name of his wife, the defendant Mary Ferguson, who became a party thereto for the purpose of assisting her husband in his intent and design, and without any consideration moving from her for the same, and that his debt was in existence long before the said purchase: and he claimed payment of his judgment debt, with interest and costs, or a sale of the premises in question

to satisfy the same ; a declaration that the said conveyance to Mary Ferguson was fraudulent and void as against him and all other creditors of her husband, all necessary enquiries, and further relief.

The rest of the facts of the case sufficiently appear from the judgment of Ferguson, J.

The action was tried at Lindsay, before Ferguson, J., on April 14th and 15th, 1884.

A. Hudspeth, Q.C., for the plaintiff. The conveyance impeached was voluntary, and the debts were in existence at the time. The debt to the sister of \$300, which was transferred to McAlpine, is the foundation of the plaintiff's judgment. This was owing at the time of the conveyance, and is still owing to the plaintiff. I refer to *French v. French*, 6 DeG. M. & G. 95 ; *Smith v. Cherrill*, 4 Eq. 390 ; *Freeman v. Pope*, 9 Eq. 206, 5 Ch. 538.

McIntyre and *Stewart*, for the defendants. The Court will not presume a fraudulent intent, when there is sufficient property to pay the debts. See *Allan v. McTavish*, 8 A. R. 440 ; *Boustead v. Shaw*, 27 Gr. 280 ; *Skarff v. Soulby*, 13 Jur. 1109 ; *May on Fraud. Conv.*, 35-44 ; *Kerr on Fraud and Mistake*, 1 Am. ed., p. 204-6. Besides the fact of the plaintiff knowing of the transaction, and advising his sister-in-law to take the conveyance, is fatal to him : *May on Fraud. Conv.*, p. 162-5. Again *Roe v. Smith*, 15 Gr. 344, shows that a man who is a surety is a creditor only when he pays the debt.

April 15th, 1884. FERGUSON, J.—The debt of the defendant Kenneth Ferguson, the existence of which at the time of the making of the conveyance sought to be impeached is relied upon by the plaintiff, was one to his sister of \$300, which arose in some way out of the distribution of their father's estate. This was represented by three promissory notes of \$100 each. These notes were transferred to one McAlpine, a money dealer, who pressed Kenneth

Ferguson for payment. Kenneth then procured his brother Hugh (the plaintiff) to endorse his note to McAlpine in satisfaction of the demand. This note so endorsed was from time to time renewed, and appears to have increased in amount very rapidly. The plaintiff finally paid it and then sued the defendant Kenneth, and obtained against him the judgment mentioned in the statement of claim for something over \$700. This original debt of \$300, with, it is fair to say, interest accrued upon it for a long period, is the only one the existence of which at the time of the conveyance is relied upon.

The conveyance was one taken to the defendant Mary Ferguson, the wife of Kenneth, upon a purchase of land by Kenneth. At that time Kenneth was in the habit of becoming intoxicated with strong drink, and squandering his money and property when intoxicated.

The purchase money was paid or satisfied by the transfer to the vendor, one Jewell, of a mortgage that had been made by the plaintiff to his brother Kenneth upon a sale of a farm by Kenneth to him. At the time of the making of the conveyance sought to be impeached the plaintiff was spoken to, if not consulted, as to the propriety of its being made to Kenneth's wife instead of to himself, and the evidence shows that he fully approved of its being done. She had before had possession of the mortgage that was given as satisfaction of the purchase money, and she was under the impression that this possession of the mortgage gave her some kind of right to it. The plaintiff was aware of this, and seems to have been under the same impression, and encouraged her to retain the possession of it. The possession of this was given up only on the condition that the conveyance in question should be made to her, and the plaintiff was aware of this at the time and fully approved of it.

I do not desire to be understood to say that this possession of the mortgage gave the defendant Mary Ferguson any legal rights to it, and I only mention the matter for the purpose of stating what really took place. The plaintiff in his evidence taken at the trial says that at the time he

signed the McAlpine notes he knew that the farm was in the name of the defendant Mary Ferguson, that it had been conveyed to her and not to her husband, that he supposes now that Kenneth had then property enough to pay all his debts without resorting to this farm; that he knew of a debt then owing from Kenneth to his aunt (which has since been paid), and that he (the plaintiff) had no intention whatever of resorting to or endeavouring to resort to this farm for payment or satisfaction in case he should have to pay the notes or any of them for Kenneth. Evidence was given respecting other transactions between the plaintiff and the defendant Kenneth, but it appears to me that all that is material here is stated above.

What the plaintiff asks is, that this conveyance should be declared to be fraudulent and void as against him and the other creditors of Kenneth. It does not appear that there are any other creditors who are complaining.

In *May on Fraudulent and Voluntary Conveyances*, at p. 162, it is said that creditors may under certain circumstances lose their rights under the statute. They may be barred by acquiescence in a transaction which they might otherwise have avoided, and even mere notice of it will sometimes have the same effect. A number of cases are referred to by the learned author, and many were referred to by counsel upon the argument, none of which, however appear to be precisely like the present case.

There was much and able argument before me as to when and under what circumstances a fraudulent intent should be inferred by the Court. That is a subject upon which much has been written and said, and I have no desire to add anything here of a general character. The circumstances of this case appear to me very peculiar. I find myself wholly unable to say that I think the conveyance sought to be impeached fraudulent as against the plaintiff, or that he has been in any degree defrauded by it. I do not perceive how I can declare it to be fraudulent and void as against him, and I think the action should be dismissed, with costs.

Action dismissed, with costs.

Afterwards, on September 5th, 1884, the plaintiff moved by way of appeal before the Divisional Court.

A. Hudspeth, Q.C., and C. Moss, Q.C., for the plaintiff. The plaintiff claims now to assume the position of his sister and of McAlpine, and that he is not bound by his approval of the deed. See *Riley v. Kent*, 14 Eq. 190. He is the holder of a debt prior to the impeached conveyance: *Masuret v. Mitchell*, 26 Gr. 435. We refer, also, to *May on Fraud*, Conv., p. 162; *Currie v. Gillespie*, 21 Gr. 267; *Crossley v. Elsworthy*, 12 Eq. 158; *Cotton v. Vansittart*, 20 Gr. 244; *Campbell v. Chapman*, 26 Gr. 240; *Irwin v. Freeman*, 13 Gr. 435; *In re Ridler*, 22 Ch. D. 74; *Ware v. Gardiner*, 7 Eq. 317; *Spiritt v. Willows*, 11 Jur. N. S. 70, 3 DeG. J. S. 293, 34 L. J. (Ch.) 365.

McIntyre for the defendants, referred to Allan v. McTavish, 8 A. R. 440; *Woodham v. Baldock*, 3 J. B. Moo. 11; *Olliver v. King*, 8 DeG. M. & G. 110; *Skarff v. Soulby*, 13 Jur. 1109.

December 12th, 1884. *BOYD, C.*—I cannot regard it as proved that any debts were owing by the defendant Kenneth at the date of the settlement other than that to his sister \$300, and that to his aunt \$120. There is sufficient evidence to warrant the Judge's conclusion that the settlor had ample means to satisfy these debts apart from the property which was settled. There is no evidence of any fraudulent intent connected with the transfer to the wife—it was done with the knowledge and approval of the family, and with a view to protect the property from being dissipated by the improvidence of the husband.

The plaintiff was himself consulted with regard to the matter, and knowing all the circumstances of his brother's financial position, he expressed his approval of what was being done. He was not then a creditor, and did not become so for over a year afterwards. I do not see (having regard to the authorities cited in *May on Fraud*, Conv. pp. 162-167,) how he can claim to have the deed set aside as a

fraud upon him. He knew that the wife owned the property before he endorsed, and he did not regard it as available to satisfy the liability he then chose to incur. I refer to *Woodham v. Baldock*, 3 J. B. Moo. 11 S. C. Gow. 35 n.; *Sagitary v. Hide*, 2 Vern. 44, and *Olliver v. King*, 8 DeG., M. & G. 110. There is also a more recent case not in *May*, which bears somewhat upon these questions, *Golden v. Gillam*, 46 L. T. 222, and an American case which in its salient points very much resembles the present case: *Pell v. Tredwell*, 5 Wend. 661. I think the judgment in review should be affirmed, with costs.

PROUDFOOT, J., concurred.

A. H. F. L.

[CHANCERY DIVISION]

MORRISON V. MORRISON ET AL.

Will—Construction—Speaking from death—Contrary intention—After-acquired property—R. S. O. ch. 106, sec. 26.

A testator by his will dated May 19th, 1873, devised to R. M. the "property on H. street," and proceeded: "I give all the rest and residue of my estate real, personal and mixed, which I shall be entitled to at the time of my decease, to A. M." At the date of the will he possessed only one property on H. street, known as the Red Lion Hotel, but he subsequently acquired other property on that street.

Held, that, notwithstanding R. S. O. ch. 106, sec. 26, the after-acquired property on H. street did not go to R. M., but fell into the residue.

The testator having expressed his intention with reference to all land acquired by him after the date of his will by appropriate words in that will, it would be going contrary to that intention to declare that some after-acquired property should be withdrawn from the residuary claim and held to pass under the prior specific devise.

Lord Lilford v. Powys Keck, 30 Beav. 300, distinguished.

THE plaintiff in this action was the executor and one of the heirs at law of David Morrison, deceased, and the defendants were his co-heirs and co-heiresses, and one Alexander Morrison, residuary devisee under, and one of the attesting witnesses to the will of the said David Morrison.

The plaintiff, in his statement of claim, alleged that the deceased died entitled to certain specified lands: and that he died on March 8th, 1883, leaving the following will:

This instrument witnesseth that I, David Morrison, &c., being of sound and disposing memory and understanding, do make, publish, and declare this to be my last will and testament. My last will is, that my funeral charges and just debts, and the expenses attending the execution of this my will, shall be paid by my executor, hereinafter mentioned. I give and bequeath to Maria Post \$500. I give and bequeath to W. Cosgrave \$500. I give and bequeath to my brother Robert Morrison \$500, and the property on Hughson street. I give, devise, and bequeath all the rest and residue of my estate, real, personal, and mixed, which I shall be entitled to at the time of my decease, to my nephew Alexander Morrison. And I do nominate and appoint my brother Thomas Morrison to be the sole executor of this my last will and testament.

Signed, sealed, and delivered by David Morrison, to be his last will and testament, this 19th day of May, 1873, in presence of

(Signed) T. CAMPBELL.

A. MORRISON.

(Signed)

DAVID MORRISON.

The plaintiff went on to allege that the will was not made or acknowledged in the presence of the witnesses present at the same time, but that they attested it at different times, and unknown to each other: that Alexander Morrison was both residuary devisee and an attesting witness: that the defendants, other than A. Morrison, were the heirs and heiresses, and that he, the plaintiff, had taken out probate: and he claimed that the will was not properly attested to pass real estate, and asked for a partition or sale of the testator's real estate: and that if the Court should hold the will sufficiently executed to pass real estate, the residuary devise to A. Morrison was void.

Alexander Morrison delivered a defence setting up certain matters not necessary to mention here.

The rest of the facts sufficiently appear from the judgment.

The action was tried at Hamilton, on March 30th, 1885, before Boyd, C.

R. Martin, Q.C., and Waddell, for the plaintiff.

Laidlaw, for the defendant Alexander Morrison.

Furlong and Parkes, for the other defendants.

The following cases were cited : *Vansickle v. Vansickle*, 1 O. R. 107, 9 A. R. 352 ; *Whateley v. Whateley*, 14 Gr. 430 ; *Ruthven v. Ruthven*, 25 Gr. 534 ; *McIntosh v. Bessey*, 26 Gr. 496.

At the conclusion of the evidence the learned Chancellor gave judgment, that the will was validly executed and was sufficient to pass real estate, but that the devise to Alexander Morrison was void, because he was a subscribing witness, and he reserved judgment as to the Hughson Street property.

Afterwards on April 22nd, 1885, he gave judgment on this point as follows:—

BOYD, C.—The testator made his will on the 19th day of May, 1873, and died on the 8th of March, 1883. He thereby devised to his brother, Robert Morrison, “ the property on Hughson Street,” and gave “ all the residue of his estate, real, personal, and mixed, which he should be entitled to at the time of his decease, to his nephew, Alexander Morrison.” At the date of the will he possessed only one property on Hughson Street, called the “ Red Lion Hotel.” He subsequently acquired other property on the same street, not connected with the Red Lion Hotel but on the opposite side of the street, consisting of three houses and lots. The point for decision is, whether both properties on Hughson street go to the brother. It is argued that the after-acquired property passes under the residuary clause, and that “ the property on Hughson street ” is to be limited to what the testator had on Hughson street at the date of the will. By the Wills Act, R. S. O. ch. 106, sec. 8, the 26th section of that Act is applicable to the will of any person who has died since the 1st of December, 1868, and the effect of that 26th section is therefore to be considered in construing the will. The 26th section is as follows : “ Every will shall be construed, with reference to the real and personal estate comprised in

it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

The disposition of land "comprised" in the will gives "the property on Hughson street," by which was intended when the instrument was executed "the Red Lion Hotel," to his brother, and at the same time the testator disposes of all the rest of his real estate which he should acquire down to the time of his decease in favour of his nephew. If the clause relating to the property on Hughson street stood alone, that might carry the land subsequently acquired on that street by virtue of section 26 cited. But I think that the next clause of the will relating to property he should be entitled to at the time of his decease manifests a "contrary intention" upon the face of the will, so that only the Red Lion Hotel goes to his brother, and all the rest of his land passes under the residuary clause. The canons of interpretation attributed to Lord Cottenham, in *Cole v. Scott*, 1 McN. & G. 518, and thus developed by Sir W. Page Wood, in *Douglas v. Douglas*, Kay 405, are, as I view it, pertinent in order to the construction of this will: "The intention of the testator is not to be altered; and if it be clear that the testator is not referring to a general class of property, but to something specific, the new statute is not to have the operation of passing property which evidently was not in the contemplation of the testator, when the subject of the gift appears to have been defined and marked out by him as existing at the period when he is speaking."

The language of this will construed apart from the statute and coupled with the evidence as to the circumstances of the testator, implies that only his then Hughson street property should go to his brother; all his other and all his after-acquired land was to go under the residuary clause. The aid of this section of the Statute is not required to carry the whole of the estate existing at the death just as the testator intended. The after-acquired real property would pass under C. S. U. C. c. 82, sec. 11,

by virtue of the form of words used in the residuary clause. In short, the testator has expressed his intentions with reference to all land acquired by him after the date of his will, by appropriate words in that will, and it would be going contrary to that intention to declare that some after-acquired property should be withdrawn from the residuary clause and held to pass under the prior specific devise. The fractional decision of the Court of Appeal in *Vansickle v. Vansickle*, 9 A. R. 352, does not much aid in the consideration of this will; but my conclusion is, I think, in accordance with the principles enunciated by Chief Justice Spragge.

These three houses and lots fall, therefore, under the residuary clause, and as that is void because the residuary devisee was one of the subscribing witnesses that part of the property will be dealt with as upon an intestacy. Costs out of the estate.

I may refer also, on the general question of construction, to: *In re Gibson*, L. R. 2 Eq. 669 and *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229, which is not quite in accord with some expressions used by the same Judge (Romilly, M. R.) in *Lord Lilford v. Powys Keck*, 30 Beav. 300. This last case makes apparently against my conclusions, but it is explicable because the reference in the will to after-acquired property did not cover the kind of property subsequently acquired, and if the subsequently acquired property did not pass under the general words of the will there would have been an intestacy, against which the Court struggles.

Re Ord, 12 Ch. D. 22, shews that the scope of the statute is not to be extended to defeat the intention of the testator as expressed in the will. See also the observations in *Jarm. on Wills*, vol. 1, p. 608 (Randolph's Am. ed.) going to shew that if the statute applies it may render the whole devise so uncertain as to invalidate it, because no evidence was given before me to indicate which property on Hughson street was intended.

[CHANCERY DIVISION.]

BALL ET AL. V. THE CROMPTON CORSET CO. ET AL.

*Patent of invention—Substitution of one method and material for another—
Mechanical equivalent.*

F., being the patentee of an article known as "Florsheim's Gore," part of the description of which was "in an elastic gore, gusset, or section * * the springs arranged in groups and made of a continuous length of coiled wire," and his licensees brought an action against the defendants who were manufacturing a similar gore, the only variation being that, instead of continuing the coiled spring from group to group of the spring, they severed the wire and connected the groups of springs with a cord. *Held*, merely an attempt to evade the patent, and that it was an infringement.

Held, however, that the substitution of coiled wire springs for India-rubber springs as previously used, was a mere mechanical equivalent for the India-rubber, and that it did not possess any element of invention, and so could not be the subject of a patent.

THIS was an action brought by Thomas Hobart Ball and others, one of whom was Simon Florsheim, the patentee, against the Crompton Corset Company and others, for an injunction to restrain the defendants from manufacturing and selling corsets containing certain gores or gussets made elastic by a spring composed of one continuous length of coiled wire, the plaintiffs alleging this to be an infringement of a patent granted to Florsheim on the 29th of April, 1881, for an elastic gore or gusset for wearing apparel known as "Florsheim's Gore."

The defendants set up (1) that Florsheim was not the first inventor; (2) that the alleged invention was not new or useful; (3) that it was not the proper subject of a patent; (4) that it had previously been used by others; (5) that patents for the same invention were in use in England and the United States for more than twelve months prior to the application for the Canadian patent; (6) that the specification for the plaintiffs' patent did not comply with sec. 14 of the Patent Act; and (7) that Florsheim's patent claimed more than he had a right to claim as new.

The action was tried at the Spring Sittings, held at Toronto on May 13, 14, 15, 16, 1884, before Proudfoot, J.

The facts material to the case sufficiently appear in the judgment of the learned Judge.

Cassels, Q. C., and *Akers*, for the plaintiffs. There is no doubt that the invention is useful. The best evidence of that is, the defendants wish to use it. The United States Commissioner of Patents had knowledge of all prior patents when he granted the American patent to Florsheim, No. 238,100. Schilling after commencing proceedings in "interference" abandoned them, and Florsheim got the patent in the United States, upon which the one in question in this suit is founded. The evidence of Lotz shows Schilling's admission that the patent was Florsheim's. The object of the patent was the practical adaptation of continuous coiled wire springs to a gusset where continuous rubber springs had proved a failure. They were not a mere substitute for India-rubber nor an improvement upon it: *Smith v. Goldie*, 9 S. C. R. 46; *Crane v. Price*, *Webster's Cases on Letters Patent for Inventions*, 377, 393; *Murray v. Clayton*, L. R. 7 Ch. 570; *Smith v. Good-year Dental Vulcanite Co.*, 93 U. S. R. 486, 497; *Putnam v. Yerrington*, *Merwin on the Patentability of Inventions*, 518. The infringement is clearly shewn by the defendant Crompton and other witnesses. The thread or string used is merely a colourable variation, having the same effect as the wire—simplicity is no objection to a patent: *Yates v. G. W. R. Co.*, 2 A. R. 226; *Hunter v. Carrick*, 28 Gr. 489. And Florsheim is clearly shewn to be the inventor.

MacLennan, Q.C., *Osler*, Q.C., and *C. R. W. Biggar*, for the defendants. The plaintiff Florsheim is not, and Schilling is the true inventor of this gore or gusset. Florsheim was a dealer in hats and gloves. Schilling was an inventor and a mechanic, and the evidence shews he invented this gore, showed it to Florsheim, and gave him an interest in it in consideration of the payment by Florsheim of the patent fees. The English patents,

especially those of Miller, show that the idea of continuous springs was not new. The fact of the "interference" being abandoned by Schilling does not affect the defendants. There is no new discovery here by Florsheim. All the elements of this gore or gusset are old, and were anticipated by former patents. There is no inventive faculty displayed in the aggregation of a number of old elements. Florsheim was not the true inventor, as the combination had been previously described: *Stead v. Williams*, 7 M. & G. 818. In the case of crinolines or hoopskirts a patent was claimed for the use of steel watch springs in lieu of whalebone, but it was held that that was not an invention that could properly be the subject of a patent: *Thompson v. James*, 32 Beav. 570; *Harwood v. The Great Northern R. W. Co.*, 11 H. L. C. 654; *Hicks v. Kelsey*, 18 Wall. 674; *Brook v. Astor*, 8 E. & B. 478; *Smith v. Nichols*, 1 Holmes, N. Y. 172, 21 Wall. 112; *Bump on Patents, &c.*, (1st ed.) 38, 44, 45, 77, 97. *Higgins on the Law and Practice of Patents* (1884 ed.) 127, 131. As to substitution, see *Hotchkiss v. Greenwood*, 4 McLean, 461, 11 How. 265; *Ex p. Maynard*, *Law's Dig.* 478; *Gould v. Rees*, 15 Wall. 187; *Whitman's Dig.* 441, 472; *Horton v. Mabon*, 12 C. B. N. S. 437; *S. C.*, 16 C. B. N. S. 116, 141; *Abell v. McPherson*, 17 Gr. 23; *Bailey v. Robertson*, 3 App. Cas. 1055; *Saunders v. Aston*, 3 B. & Ad. 881; *Losh v. Hague*, 1 *Webster's Cases on Letters Patent*, 208; *Clark v. Adie*, L. R. 10 Ch. 667, 2 App. Cas., 423. As to the invention see *Penn v. Bibby*, L. R. 1 Eq. 548, 2 Ch. 127. The combination is old, and all the elements are shown in Miller's patent, which was produced: *Higgins' Dig. of Patent Cases*, p. 128: *Saxby v. The Gloucester Waggon Co.*, 7 Q. B. D. 305. The specification is bad, as it does not distinguish what is new from what is old, and the only new part is the substitution of wire springs where India-rubber was previously used. There was no claim for a combination by a claim for the whole thing as new: *Lister v. Leather*, 8 E. & B. 1004; *Foxwell v. Bos-*

tock, 4 DeG., J. & S. 298, *Per Westbury, L. C.*, at p.p. 313-4. The plaintiffs do not claim an improvement, but a new substantive article: *White v. Fenn*, 15 W. R. 348; *Patent Bottle Envelope Co. v. Seymer*, 5 C. B. N. S. 164; *Parkes v. Stevens*, L. R. 8 Eq. 358; *S. C.*, L. R. 5 Ch. 36. A patent for a combination does not cover the parts separately: *Gamble v. Kurtz*, 3 C. A. 425. *Goodeve's Patent Cases*, Index, p. 629, sub. tit.: "Subject Matter of a Patent," collects all the cases. The claim is void, and the patent fails under s. 14 of the Patent Act of 1872, 35 Vic. c. 26. The patent is for a mere aggregation of old elements with the substitution of another old material for India-rubber, and is not for an improvement in a known combination: *Clark v. Adie*, L. R. 10 Ch. 667; *S. C.*, 2 App. Cas. 315, see judgment of Lord Cairns, at 320, 221; *Curtis's Law of Patents* (4th ed.) s.s. 111 (c), 111 (d), 311: *Electric Telegraph Co. v. Brett*, 10 C. B. 838. The alleged invention is not wholly novel, and in so far as it is not, cannot be the subject of an independent patent. The use of a new material to produce a known article is not the subject of a patent: *Rushton v. Crawley*, L. R. 10 Eq. 522; *Per Malins, V.C.*, at p. 529; *Hicks v. Kelsey*, 18 Wall, 670; *Alden v. Dewey*, 1 Story's Rep. 336. Model may be used to explain specifications: *Bump on Patents, &c.*, (1st ed.) 32; *Putnam v. Hickey*, 3 Bissel's R. 161.

Cassels, Q.C., in reply. The patent itself is *prima facie* evidence in favour of the plaintiffs: *Summers v. Abell*, 15 Gr. 532. There was no public use of this combination before the Canadian patent, and the mere fact that it was used in the model of a prior American patent does not prevent the issue of a patent here. The evidence shows that the specification is quite sufficient. A continuous wire spring was never used before, and rubber is not an equivalent for coiled wire. There is no doubt the invention is useful, and that the wire is better than rubber, as it does not rot. The following cases were also cited: *Harrison v. Anderston Foundry Co.*, L. R. 1 App. Cas. 574; *Crane v. Price*, 4 M. & G. 580, approved of in *Smith*

v. *Goldie*, 9 S. C. R. 46; *Hayward v. Hamilton* (Court of Appeal, England, not reported); *Daw v. Eley*, L. R. 3 Eq. 496.

June 25, 1884. PROUDFOOT, J.—The plaintiffs are several persons (including Simon Florsheim, the patentee), trading under the style of “The Chicago Corset Company,” and their licensees of the patent in question. The defendants are the Crompton Corset Company and some persons who have purchased and sold articles said to be an infringement of the plaintiff’s patent.

On the 29th April, 1881, the Government of Canada, by Letters Patent, granted to Simon Florsheim, his executors, administrators, and assigns, for five years, the exclusive right, privilege, and liberty of making, constructing, and using, and vending to others to be used, his invention known by the name of “Florsheim’s Gore,” being a new and useful improvement on elastic gores, gussets, &c., for wearing apparel—a short description of which is as follows :—

“It consists, 1st, in an elastic gore, gusset or section, for wearing apparel, composed of a covering material, having tubes, spiral metal springs enclosed by such tubes, and not extending to the edges of the covering material, and stayed at their ends by such covering material, and in-elastic margins outside of the springs.

“2nd. In an elastic gore, gusset or section of the character described, the springs arranged in groups, and made of a continuous length of coiled wire.

“3rd. In an elastic gore, gusset or section of the character described, the metal fastenings ‘C’ extending across the ends of the tubes between the thicknesses of the covering material.”

Two of the defences set up were, that Florsheim was not, and that Gustav Schilling was, the first inventor; and that the defendants had not infringed.

Both of these I find upon the evidence in favour of the plaintiffs.

It was shown that the only variation between the plaintiffs' gore or gusset and that made by defendants is, that instead of continuing the coiled spring from group to group of the springs, as the plaintiffs do, the defendants sever the wire, and connect the groups with a string or cord. This, I consider, to be merely an attempt to evade the patent, and that it is an infringement of the invention.

Other defences deny the invention to be useful, and deny that the alleged invention was one for which a patent could be granted, and say that the invention was used by others before the alleged invention by Florsheim, and that the patents for the invention were in existence in the United Kingdom of Great Britain and Ireland, and in the United States of America, more than twelve months prior to the application in Canada for a patent.

It was clearly established that the invention is useful.

As to the other defences, I think I must find in favour of the defendants.

Several other English patents were produced anticipating different parts of combination of the plaintiffs, but except one I do not think any of them embraces the whole of the plaintiffs' invention. That one is the patent to the Millers of the 31st of December, 1866, No. 3,451, for improvements in the manufacture of elastic gussets. That invention, as stated in the specification, had for its object "improvements in the manufacture of gussets suitable for use in boots and stays and for other purposes. In the manufacture of gussets it had been usual to weave the vulcanized India-rubber springs in the fabric in the process of manufacture, the India-rubber forming a part of the warp of the fabric; or where the gussets were of leather, the vulcanized India-rubber springs were commonly attached to the leather by means of cement, and in either case each line or spring of India-rubber was a separate piece." But in the invention of the Millers they "secured the vulcanized India-rubber springs between two pieces of woven fabric, leather, or other material, by stitching with a sewing machine, the stitches running in parallel lines,

and passing through the two pieces of fabric or material between the India-rubber springs, and the springs in place of being each a separate piece, were in one piece; the length of the vulcanized India-rubber cord at the end of each traverse across the gusset being turned round and caused to return parallel to itself; thus the liability of the India-rubber to slip and work out of the gusset was much reduced. When gussets made in this manner are worked into boots or other articles, the stitches by which they are secured are passed through a margin on each side of the gusset, and not through the India-rubber part of the gusset as heretofore." And in describing the mode of making their gusset they describe a process of crimping or puckering, and also a mode of making an extra strong margin of inelastic material.

So that in this patent there is a combination of puckered or crimped cloth for the gusset tubes formed by stitching the double thickness of cloth and the employment of a continuous spring.

The only question then is, whether the substitution of a coiled spring for India-rubber, and the arrangement of the tubes into groups are sufficiently novel, and display enough invention to entitle the plaintiffs to a patent. I think they are not.

[After stating the evidence of several of the witnesses, the learned Judge proceeded:]

From this evidence I think the plain result is, that the coiled wire is only a mechanical equivalent for the India-rubber spring, and that it does not possess any element of invention.

The arrangement of the tubes in groups was not new, though it does not seem to have been so used in connection with a continuous spring until the present patent. But it does not seem to me to be a patentable invention. The only use of the arrangement is to increase or diminish the stiffness of the gusset, some groups having more springs than others, according the stiffness desired at any particular point. But this is not an invention; it is only

a mode of applying the invention to suit particular cases, and, according to the stiffness required, there might be no group at all, when it would be simply the Miller arrangement. Leaving out a spring here and there to diminish the tension of the gusset it has no element of invention.

In *Thompson v. James*, 32 Beav. 570, the substitution of hoops made of steel watch springs instead of hoops made of whalebone, cane, and other substances, was held not to be the subject of a patent.

What combinations of old inventions will sustain a patent was discussed at considerable length in *Smith v. Goldie*, in the Court of Appeal and in the Supreme Court. I adopt the language of Lord Chelmsford in *Penn v. Bibby*, L. R. 2 Ch. 127, 135, 136, quoted by Ritchie, C. J., that, "It is very difficult to extract any principle from the various decisions on this subject, which can be applied with certainty to every case; nor, indeed, is it easy to reconcile them with each other. * * * * In every case of this description one main consideration seems to be, whether the new application is so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study."

In *Smith v. Goldie*, the Supreme Court came to the conclusion that the result in that case was produced by the combined and simultaneous action of the draft upwards, created by the fan, and the continuous operation of the brush or brushes worked by the machinery. It was the *simultaneous action* of both which produced the result; it would not have been obtained by the independent action of either. It was, therefore, to all intents and purposes, a combination that produced *simultaneous* results, this simultaneous action not having been previously obtained.

I do not see in that case, much relied on by the plaintiffs' counsel, or in the numerous cases referred to in it, anything to lead one to the conclusion that in the present case there was any such novel combination as is necessary to support a patent.

I have not thought it necessary to refer to the other patents in the United States, nor to quote minutely the numerous cases cited to me; none of them seem to me to affect the decision that ought to be arrived at in this case.

The action is dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

CORE V. THE ONTARIO LOAN AND DEBENTURE COMPANY
ET AL.

Registered title—Equitable charge—Several mortgages—Priority.

W. and his son W. W., mortgaged separate parcels of land owned in severalty to the defendant company for \$4000, with a proviso for releasing W. W.'s land on payment of \$500 and the other parcels on payment of sums named. The covenant for payment was joint. W. W. afterwards sold his land to J. W., subject to the payment of the \$500 to the company. W. then mortgaged his land to the plaintiff, by an instrument which declared it subject to the company's mortgage, and the manner in which the \$4000 was distributed upon the lands. The various conveyances were registered. It was proved that W. W. was merely a surety for his father in the mortgage transaction with the company, but the plaintiff had no notice of this.

Held, (reversing the judgment of Proudfoot, J.) that the plaintiff's registered title prevailed over the equity of W. W. to charge his father's lands with the \$500 for which he (W. W.) had made his land liable, and the land of the son was charged in favour of the plaintiff with the \$500 and interest.

Gray v. Ball, 23 Gr. 390, approved and followed.

THIS was an action brought by William Edward Core, against the Ontario Loan and Debenture Company, William Wilson, the elder, Elizabeth Wilson, his wife, William Wilson, the younger, and John Wilson, for the purpose of marshalling certain securities under the following circumstances:

William Wilson, the elder, was the owner of the north half of lot 14 in the 9th concession of the township of Morris, and two village lots in the village of Blyth, and

applied to the loan company for a loan of \$4,000, the company, however, declined to make the advance unless additional security was given, and he then applied to his son, William Wilson, the younger, to become his surety for the proposed loan and to mortgage his land, viz: the south half of lot 16, in the 8th concession of the said township, which the son consented to do. And thereupon, by an indenture dated the 16th of August, 1880, between the two Wilsons, of the first part, and the loan company, of the second part, after reciting that the father was the owner of the north half of lot 14 and of the two village lots, and that the son was the owner of the south half of lot 16, and that they had agreed to mortgage the same for the sum of \$4,000 advanced to them, they granted the lands to the company in fee, with a proviso for redemption, and a covenant for payment by both the mortgagors. The mortgagors were to have the right to have the following parcels respectively released from the mortgage as soon as certain sums were paid, viz: The south half of lot 16 when \$500 should have been paid, or the village lots when \$600 should have been paid, or both the foregoing properties when \$1,100 should have been paid.

By an indenture made the 13th of June, 1882, W. Wilson, the younger, in consideration of \$500, granted the south half of lot 16 to his brother John Wilson, in fee, subject, among other things, to \$500 to the loan company.

By an indenture of February 14th, 1883, W. Wilson, the elder, having borrowed from William Edward Core, the present plaintiff, the sum of \$1,000 upon the security of the north half of lot 14, granted the same to him in fee, "subject, however, to a mortgage of \$4,000 to the Ontario Loan and Debenture Company of London, to be divided between the following lands, as follows: \$2,900 on the north half of 14, and \$500 on the south half of 16, and \$600 on the two village lots," &c.

John Wilson was a witness to the deed, and the attestation clause certified that it was first read over to Elizabeth Wilson, a party to it, before signing.

This action was commenced on the 24th of March, 1884.

Default having been made by the Wilsons in payment of the sums secured by the first mortgage mentioned, the company held a sale of the lands, as stated in the statement of claim, on the 4th of April, 1884, when the village lots were sold for \$300, and the north half of 14 for \$4,450, which sums were more than enough to pay the loan company, but the surplus was not enough to pay the plaintiff.

The plaintiff claimed to have a lien on the south half of lot 16, to the amount of \$500 at least, and a proportionate part of the arrears of interest due to the company on their mortgage, towards satisfaction of the balance due to him after the application of the surplus proceeds of the sales already had, and if necessary to stand in the place of the loan company, with all their rights and powers under their mortgage to the extent of the said sum of \$500, and interest; and he claimed payment, and in default a sale of the south half of lot 16, judgment and execution for his debt, interest and costs as against W. Wilson, the elder, and an account, if necessary, of the surplus proceeds of the sale by the loan company,

The action was tried at Goderich, on October 24th, 1884, before Proudfoot, J.

M. C. Cameron, Q.C., and M. G. Cameron, for the plaintiff. We have a right to have the securities so arranged that a person holding two funds as security shall not prejudice him who has only one: *Aldrich v. Cooper*, 8 Ves. 382, 2 W. & T. L. C., 5th ed., p. 80; *Quay v. Sculthorpe*, 16 Gr. 449; *Gwynne v. Edwards*, 2 Russ. 289. Core had a right to redeem the prior mortgage, and hold it against all the properties: *Garrett v. Johnstone*, 13 Gr. 36. Registration was no notice of the alleged suretyship of W. Wilson, Jr., and the plaintiff had no notice of John Wilson's alleged equity: *Dominion Savings and Investment Society v. Kittridge*, 23 Gr. 631; *Brower v. Canada Permanent Building Association*, 24 Gr. 509. See also *Joice v. Duffy*, 5 C. L. J., O. S. 141.

J. T. Garrow for the defendants, William Wilson, Jr., and John Wilson. There is no question *W. Wilson, Jr.*, was a surety, and as such he had a prior equity to be relieved from liability. *Quay v. Sculthorpe*, 16 Gr. 449, disposes of the case. No question of registry or of notice really arises in the case. Marshalling is only permitted when there are two funds of a common debtor: *Aldrich v. Cooper*, 2 W. T. L. C., 5th ed., p. 80; *Sawyer v. Goodwin*, 1 Ch. D. 351; *Dawson v. Bank of Whitehaven*, 4 Ch. D. 639; *Drew v. Lockett*, 32 Beav. 499; *Johnston v. Reid*, 29 Gr. 293.

J. Magee for the Loan Company. The company are entitled to their costs, being in the position of stakeholders.

Cameron, Q. C., in reply. *W. Wilson, Jr.*, never had any equity as against the company. He could not have required them to exhaust their remedies against the father. There was an equity between the father and son, but not against the company. *Wilson, Jr.*, appeared on the registry as a joint debtor, and the registry law prevents the assertion of an equity which is not registered. *Quay v. Sculthorpe* has really no bearing on the case now before us. It merely is a case of a surety paying a creditor, and becoming entitled to all the securities held by the latter. Marshalling is not confined to cases where the securities are made by the same debtor. The plaintiff has a right to stand in the place of the company against the south half of lot 16. I refer to *Moffatt v. Bank of Upper Canada*, 5 Gr. 374; *Bowker v. Bull*, 1 Sim., N. S. 29; *South v. Bloxam*, 11 Jur., N. S. 319; *DeColyar on Principal and Surety*, 328; *Bugden v. Bignold*, 2 Y. C. C. C. 375; *Wigle v. Settrington*, 19 Gr. 512; *Forrester v. Campbell*, 17 Gr. 379; *Grey v. Ball*, 23 Gr. 390; *Bell v. Walker*, 20 Gr. 558.

November 8th, 1884. PROUDFOOT, J.—It does not appear on the conveyances that *W. Wilson, the younger*, was only a surety for his father, but it was satisfactorily established by parol evidence at the hearing that he was only a surety, and that he received no portion of the mortgage money.

The plaintiff contends that he should be declared to have a lien on the south half of lot 16, or be subrogated to the rights of the company, because the company, having had security on several parcels of land, should not be allowed to realize their debt out of the one parcel on which the plaintiff had alone security.

The plaintiff also argued that the equitable right or interest of John Wilson, being unregistered, cannot prevail against a subsequent registered equity without notice. The plaintiff has a subsequent registered deed, but not a registered equity. The cases to which I was referred of *Wigle v. Settingington*, 19 Gr. 512; *Forrester v. Campbell*, 17 Gr. 379; *Grey v. Ball*, 23 Gr. 390, and *Bell v. Walker*, 20 Gr. 558, have no application, for in these cases the subsequent grantee was a grantee of the land in which the unregistered equity was claimed. Here the equity claimed by John Wilson is to have the south half of lot 16 released from the mortgage, the debt having been paid by the sale of the lands of the principal debtor, but the plaintiff is not a grantee of the south half of lot 16. If the registry law could in any case apply with regard to the equities now in question it certainly cannot apply here.

The plaintiff also argued that he might have redeemed the loan company, and thus got a charge on the whole property for both debts. Assuming the plaintiff to have the right to redeem, and the law of consolidation to apply, he could not charge John Wilson's land with the amount of his mortgage. In *Fisher on Mortgages*, 1st ed., sec. 1246, the law is stated in these terms: "If two join in mortgaging their several estates to the same mortgagee, to secure a sum advanced to them both, or to one of them only, and then one mortgages to the same mortgagee, for his own debt, property, part of which was included in the former mortgage; he who is not mixed up with the last security shall not have the onus of redeeming it."

But the action is not brought to consolidate the securities; it is to marshal them.

It is essential to the application of the doctrine of marshalling, not only that there should be two creditors of the same person, but that one of them should have two funds belonging to the same person to which he can resort. In *ex parte Kendall*, 17 Ves., at p. 520, Lord Eldon observes: "It was never said that if I have a demand against A. and B., a creditor of B. shall compel me to go against A. without more; as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety; to the intent that all the obligations, arising out of these complicated relations, may be satisfied; but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity, giving B. the right, for his own sake, to compel me to seek payment from A."

The rule is not confined to the administration of assets, but is applied to other cases where the parties are living. Lord Hardwicke, in *Lanoy v. Duke of Athol*, 2 Atk., at p. 446, says that if a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Court, in order to relieve the second mortgagee, has directed the first to take his satisfaction out of that estate only which is not in the mortgage of the second mortgagee. Here, it will be noticed, there is one debtor with two estates. And marshalling is not enforced to the prejudice of third parties. *Aldrich v. Cooper*, 8 Ves. 308, avoids dealing with the rights of third persons intervening. And in *Averall v. Wade, Lloyd & Gould*, Temp. Sugd. 282, it was held that, where a person seized of several estates and indebted by judgments, settled one of the estates for valuable consideration, and subsequently acknowledged other judgments, the subsequent judgment creditors had no equity to compel the prior judgment creditors to resort to the settled estates.

In the case of *Gwynne v. Edwards*, 2 Russ. 289, the double fund was the property of the one debtor.

The same rule prevails in the United States. In *Dorr v. Shaw*, 4 Johns. Ch. 17, the defendant had a joint judgment against David Stafford and his son Peter Stafford, which was a lien on seventy-two acres belonging to the father, and thirty acres of the son's. The plaintiff held a younger judgment lien on the father's land. He subsequently bought the father's land, and the defendant became the purchaser of that which was owned by the son. The plaintiff sought to have the defendant enjoined from levying on the seventy-two acre tract, or be compelled to assign his judgment to the plaintiff on receiving the debt, interest and costs. Chancellor Kent said if both judgments had been against David Stafford only, the rule that the prior creditor must be thrown first on the fund not reached by the second judgment might have applied, and continued: "but here we have no means of knowing whether he or his son ought to pay the debt; and it might be very unjust as between these two original debtors, if the Court should interfere, and charge the debt upon one of them, instead of the other. They are not before the Court, and we have nothing in the case to guide us in making a selection between them."

What was uncertain in *Dorr v. Shaw* has been rendered certain in the case before me, for both the father and son are before the Court, and it has been established that the debts were both those of the father, and that the son was surety for one of them only.

The American cases are equally clear that a Court of equity will not compel a creditor to proceed against the estate of a surety, in order to leave the principal's estate free for the discharge of his debts. For as the surety has a right of subrogation against the principal, so no one claiming under the principal can be entitled to subrogation against the surety: *Johns v. Reardon*, 11 Md. 465; *Ayres v. Husted*, 115 Conn. 503.

And in our own Court, *Quay v. Sculthorpe*, 16 Gr. 449, is equally pronounced in regard to the surety's right, and is in fact decisive of the present case. There James Fox

had mortgaged his land to a building society, and Sculthorpe had mortgaged his land for payment of it as surety. Fox afterwards made another mortgage. The building society took proceedings against both Fox and Sculthorpe, and placed a writ against lands in the hands of the sheriff. Sculthorpe made mortgages of his lands, and subsequently the sheriff sold the lands of Sculthorpe. It was held that the mortgagees of Sculthorpe the surety were entitled to the benefit of the mortgage given to the building society by Fox as against any subsequent mortgage by the mortgagor.

By the sale of the north half of lot 14 and of the village lots, the debt for which William the son became surety was discharged, and John has the right to insist upon this discharge, and that the south half of lot 16 is no longer liable.

The plaintiff also places his right in his statement of claim upon the ground that the father represented that only \$2,900 of the mortgage to the loan company was charged on the north half of lot 14, and at the hearing he insisted that John Wilson had notice of this representation, and thus enabled the father to commit a fraud on the plaintiff. It might suffice to say that no charge of this nature is made against John in the statement of claim. But I do not think it is open to the plaintiff to place his case on that ground. He knew of the mortgage to the loan company, and his own is expressly made subject to it, and on the ordinary rule he must be taken to have known its contents. But the plaintiff on his examination as a witness says that W. Wilson, the elder, told him there was \$4,000 against the whole property. In fact there seems to have been no representation not embodied in the mortgage to the plaintiff, and that states that the loan company had a mortgage for \$4,000, to be divided between the following lands, &c. That is not an incorrect description of the mortgage to the loan company, for the south half of lot 16 was to be discharged on payment of \$500, and the village lots on payment of \$600, and both on payment of \$1,100,

thus leaving \$2,900 for the north half of lot 14. But the mortgage was stated to be on the whole, and involved the right in the mortgagee to realise out of any and every part of the mortgaged property.

The loan Company are defendants, but have no interest in the surplus in their hands, and are ready to pay as the Court may direct. They are necessary parties in regard to the right of subrogation claimed by the plaintiff.

The case shortly resolves itself into the case of two equities, of which the plaintiff's is the later.

The plaintiff is entitled to the surplus in the hands of the loan Company, and John Wilson is entitled to have the mortgage to the company released as to the south half of lot 16. The plaintiff must pay the costs of all the defendants except W. Wilson, Sr., and the surplus in the hands of the company may be applied in or towards the discharge of them. If more than sufficient for that purpose the balance will be paid to the plaintiff. The plaintiff is entitled to judgment against W. Wilson, the elder, for his debt and costs of suit, as if he had been the sole defendant. The action is dismissed against Elizabeth Wilson, William Wilson, the younger, and John Wilson. If the amount of the claim against W. Wilson, the elder, is disputed, there will be a reference to the Master at Goderich to take the account. The loan Company will be ordered to pay the surplus in their hands in accordance with the above directions, and to execute a discharge of their mortgage as to the south half of 16.

A. H. F. L.

THE plaintiff appealed from this judgment to the Divisional Court, and the appeal was argued on February the 18th, 1885, before Boyd, C., and Ferguson, J.

MacLennan, Q. C., for the appellant. The defendants, the company, are the mortgagees of three different parcels and have security on all three for their debt,

while my client is mortgagee of only one of the three, and he claims that his piece should be sold last under the power of sale in the company's mortgage. It is clear that if there had been no suretyship the plaintiff would have the right he claims on the documents as they exist, viz., to charge \$500 on the son's land, but I contend that as against the plaintiff's registered mortgage the suretyship right, which is an unregistered equity, cannot prevail. All the cases in the judgment appealed from are discussed in *Aldrich v. Cooper*, 2 White & T. L. C., 4th ed., vol. 2, p. 78. My contention rests on the registry law. The right of the son to be relieved of the \$500 charged upon his land is an equitable right, and if it were not for the suretyship he would not have it: and it not being registered, but the plaintiff's mortgage being registered, and the plaintiff having no notice of the son's equitable right, the registry law must protect his legal rights. If he had had any notice he could not claim this. The mortgages speak for themselves, and not having any notice the plaintiff advanced his money in good faith, so that it would be a fraud on him if the undiscovered suretyship should place any other incumbrances before him. John, the son, who is the purchaser from the son William, the original mortgagor with the father, is in no better position than William, for his deed mentions the mortgage to the Loan Company. In fact his position is not so good, for he knew of the loan from the plaintiff and how the money of the loan from the company was alleged to be distributed, and that \$500 of it was said to be on his land. The original mortgage was a joint mortgage and showed no apportionment of any amounts; then the deed was made from William to John and John took William's place and his land was made subject to \$500; then the mortgage to the plaintiff is an apportionment, and he is entitled now as a consequence of what took place to have John's piece charged with \$500. On the face of the mortgage to the company William Wilson, the father, had an apparent interest in lot 16 (John's lot) and he gave the plaintiff, in his mortgage to him, his right

of distribution as to that, and the plaintiff registered it. The present state of affairs is not only hurtful to the plaintiff but, if allowed, as contended for by John, would be fraudulent by him against the plaintiff. The written and registered documents should control the matter. When the plaintiff took his mortgage he took subject only to \$2,900, and the suretyship, if any, should not be allowed to prejudice him. The rights of the parties will be settled even after changes have taken place, and the plaintiff is entitled to be put in the place of the company: *Fisher on Mortgages*, 4th ed., s. 1,117. If there was nothing else in the case, the fact of the father executing the mortgage, wherein the mortgage money was distributed, to the plaintiff with the knowledge of the son, he being the witness and hearing it read over and not notifying the plaintiff in any shape, is sufficient to estop him from setting up his present claim, and it is too late for him to do so now. R. S. O. c. 111, s. 81, provides that no equitable lien charge, etc., shall be deemed valid as against a registered instrument, etc. [BOYD, C.—Could you redeem the mortgage and hold it against the father and son?] Certainly. *Moss*, Q.C.—Oh, no! Not at all! [BOYD, C.—If a stranger bought it could he not?] *Moss*, Q.C.—Yes. [BOYD, C.—Then why not the subsequent mortgagee?] *Moss*, Q.C.—That is where the difference is!

Moss, Q.C., for William and John Wilson. As to John's position as a witness to the plaintiff's mortgage, no such case is made out by the plaintiff's pleadings, and it is not charged that he stood by and was silent, or that his conduct had anything to do with the position of the mortgages. Plaintiff did not rely on that until he came to his argument, as the evidence shows the documents were put in at the trial without any proof of the fact that John was a witness, and none was given when he closed his case. It only appeared in plaintiff's evidence when called in rebuttal. [BOYD, C.—But if that is a turning point of the case would it not be unreasonable not to allow him an opportunity to give the evidence?] His father may have

told him the mortgage was something else: *Silverthorn v. Hunter*, 26 Gr. 390. My learned friend seems to treat John as if he was in some way liable to pay the company yet; but the fact is, the father has paid them in full, and the position of the parties is changed. The father could not compel him to do it, because he had no claim against either William or John. [BOYD, C.—The apportionment was subsequent to your getting the property?] Yes, but our land is freed now by the company being paid. If the father could have thrown anything on the son's land the plaintiff here could. [FERGUSON, J.—But Mr. Maclellan says his client took without any notice of the suretyship and has a registered title, so that the suretyship cannot be set up against him.] The only right, if any, that the plaintiff had was an equity, and that can be overthrown by a higher equity, and the registry law does not affect it: *Boucher v. Smith*, 9 Gr. 347. Where does the registry law give the plaintiff the right he claims? There is nothing registered against our land now, and if the plaintiff was to attempt to register anything he has notice. It is quite clear there was no duty on the registrar to register the plaintiff's mortgage on our land, it should be registered only on the lot transferred: *Ontario Industrial Loan & Co. v. Lindsay*, 3 O. R. 66. The pleadings do not claim the benefit of the registry laws. The doctrines of marshalling do not apply. As to prior equity prevailing, see *Merchants Bank v. Morrison*, 19 Gr. 1. As to the position of a surety who paid off as against the original parties: *Drew v. Lockett*, 32 Beav. 499. I refer also to *Barker v. Eccles*, 17 Gr. 277; *Dawson v. The Bank of Whitehaven*, 4 Ch. D. 639; *Bowker v. Bull*, 1 Sim. N. S. 29; *Coote's Law of Mortgages*, 4th ed., 823, 824, 825, 970.

Hoyles appeared for the company.

Maclellan, Q.C., in reply. The pleadings show that John knew the representations of the father and what the plaintiff claimed. *Boucher v. Smith*, 9 Gr. 347, is merely a case of marshalling, and the question of registration raised here did not come up in it. My learned friend says

the plaintiff's mortgage could not be registered on the son's lot. The registry law provides that delivery of the instrument properly proved to the registrar is all that is necessary to make it a registered instrument, and all affected must take notice of it. The rights of a surety are purely equitable. This is not a case of two simple equities to be decided by the priorities.

March 21, 1885. *BOYD, C.*—According to the terms of the mortgage executed by father and son to the Loan Company both are liable as principals; but as between themselves the son's land is primarily liable for \$500 and the father's land is primarily liable for the balance of \$3,500. The son William conveys his land (lot 16) to his brother John, subject to the payment of this \$500; and the father mortgages his land (lot 14) to the plaintiff. In this mortgage is set forth the manner in which the \$4,000, payable to the Loan Company, is distributed upon the father's and son's land respectively, and to this mortgage the brother John is a subscribing witness. Upon this state of facts each parcel of land is to bear its own share of the \$4,000, and the son has no right to onerate the father's land with payment of the \$500 which is apportioned to the son's land. Upon this state of facts John (who stands in William's shoes) has no right to cast the \$500 with which his land is charged upon the land held in mortgage by the plaintiff. But this the defendants claim to do because, as they say and prove, William was only a surety for the father. That fact is not disclosed on the registry, nor was it made known to the plaintiff before he became a registered mortgagee. It thus appears that the defendants are setting up an unregistered equity to change the legal character and effect of the company's mortgage as against and to the prejudice of the plaintiff, a subsequent mortgagee without notice. The effect of this evidence is to make the father and his land primarily liable for the payment of the whole \$4,000, but this is an equity which cannot be enforced as against the plaintiff, who took his

mortgage on the footing of the contract as to the distribution of the debt set forth in the company's mortgage. The case is within sec. 81 of the Registry Act. The son has, by reason of his suretyship, an equitable interest affecting the father's land by virtue of which he could, as between him and his father, insist on the father's land being first levied upon for the payment of the whole \$4,000 mortgage. But that equitable right ceases to be valid when it comes into conflict with the subsequent rights of a registered mortgagee of the land which it is sought to subject to this additional burden. That is the meaning of this section of the Act as expounded in *Grey v. Ball*, 23 Gr. 394, a decision which has never been questioned. For this short reason I think the judgment in appeal should be reversed, and that it should be declared that the land of the son is to be charged in favour of the plaintiff with payment of \$500 and interest thereon from the date of the sale by the Loan Company.

This to be paid in a month (otherwise sale) as also the costs of the litigation, which should be borne by the unsuccessful defendant (*i.e.* John.)

FERGUSON, J.—The facts are clearly and at length stated in the judgment by Mr. Justice Proudfoot. The mortgage to the Loan Company securing the \$4,000 was made jointly by Wilson the father and William Wilson the son. The covenant to pay this money was their joint covenant. It stated the ownership of the lands respectively, and provided that the mortgagors were to have the right to have the lands of the son released from the mortgage on payment of \$500. It also provided that they were to have the right to have another part of the lands (the village lots) released on payment of \$600. This is perhaps not material. The mortgage was duly registered, and the plaintiff at the time of taking his mortgage had otherwise notice of it, *but he had not any notice that William, the son, was surety only for his father in making the transaction with the Loan Company.* It was admitted that

the title to each of the parcels of land was a registered title throughout. It was not contended that the defendant John Wilson had any greater or better right than had been that of his brother William, the conveyance to him from his brother having been made expressly subject to this mortgage as well as another mortgage, which is not in question here. The mortgage to the plaintiff was expressed to be subject to the mortgage to the Loan Company, stating that the moneys thereby secured to the Loan Company were apportioned amongst the properties mortgaged, so that the father's lands (those embraced in the plaintiff's mortgage) were onerated with \$2,900, and the lands of the son William (now the son John) with \$500. This mortgage to the plaintiff was duly registered. The defendant John Wilson was a subscribing witness to the execution of it, and the attestation clause certifies that it was read over before being signed by one of the parties to it. I think that the plaintiff was under these circumstances justified, when making the mortgage transaction with the father, in assuming that the son's land was onerated with and primarily liable for the payment of \$500 of the moneys secured by the mortgage to the Loan Company, and in relying upon this as being the fact; and that the defendant John Wilson has now no right as against the plaintiff to cast the payment of this \$500 upon the lands of the father mortgaged to the plaintiff. It is claimed by the defence that John has this right, for the reason that the son William was *surety* only for the father. This suretyship does not appear in any way in the registry office; its existence was not denied, but, as before stated, the plaintiff had no notice of it at the time of taking or registering his mortgage. This was admitted, or at least not disputed, and I think this claim and the contention in favour of it are met by section 81 of the Registry Act, R. S. O. cap. 111, and the construction placed upon the section, or rather effect given to it by the late Chief Justice in the case *Grey v. Ball*, 23 Gr. 390, at 395, where he says: "I think I ought to give effect to the Act

according to what appears to be its intent, viz., to make it safe for purchasers of land to deal in the matter of title as far as practicable upon what appears in the registry office."

I think this claim, set up by the defendant John Wilson, is in its nature an equitable interest in lands, and that, so far as the plaintiff is concerned, it was defeated by the registered instrument (the plaintiff's mortgage).

For these reasons I agree in the conclusions expressed by the Chancellor in his judgment.

G. A. B.

[CHANCERY DIVISION.]

THE VICKERS EXPRESS COMPANY V. THE CANADIAN
PACIFIC RAILWAY COMPANY ET AL.

Consolidated Railway Act, 1879—Express companies—Reasonableness of rates—Facilities—Employment of station agents as agents of express company—Preference of one express company over another.

In an action by an express company against a railway company and another express company to whom certain privileges were granted by the railway company which were withheld from the plaintiffs, the principal one being that of employing the railway station agents to act as agents of the defendant express company, and in which it was also claimed that the rates charged by the railway company to the plaintiffs were unreasonable.

Held, that even if the Court had jurisdiction to inquire into the reasonableness of the rates, which was doubtful, no collusion being shewn between the defendant companies, it would not on the record and evidence in this case do so.

Held, also, that the employment of the station agents of a railway company to act as agents of express companies, with the privileges they had at the stations, is a "facility" within the meaning of the Consolidated Railway Act of 1879, 42 Vic. c. 9, s. 60, sub-s. 3 (D.), and that when such privilege is granted to one express company and refused to another, whether by contract or obligatory arrangement or not, it is an illegal bargain in contravention of the third sub-section of the Act.

THIS was an action brought by The Vickers Express Company (Limited) against The Canadian Pacific Railway Company and the Dominion Express Company, to compel

the railway company to afford the plaintiff company the same facilities in conducting their express business on the Toronto, Grey, and Bruce Division of their line of railway as they did to the defendants, The Dominion Express Company.

The plaintiffs' statement of claim set out that, the plaintiff company was duly incorporated: that the defendant railway company was subject to the Consolidated Railway Act of 1879, 42 Vic. c. 9 (D.), so far as relates to the matters and things therein referred to: the defendant express company was duly incorporated: that the Toronto, Grey, and Bruce Railway was a line of railway running from Toronto to certain points: that the defendant railway company was operating the said line under a lease: that from the time of the opening of the Toronto, Grey, and Bruce R. W. Co. one John Joseph Vickers, the present general manager and principal stockholder of the plaintiff company had had the exclusive express business over the said line: that the said John Joseph Vickers had, with the consent of the Toronto, Grey, and Bruce R. W. Co., appointed and employed certain station agents of the company to act as his agents, and they had acted as such: that the right to so employ said station agents was a valuable one: that said Vickers had transferred all his rights to the plaintiff company: that the plaintiff company immediately after its incorporation applied to the defendant railway company to be allowed to carry on an express business as successors of said Vickers, and were allowed to do so up to the second day of December, 1884, under an agreement with the defendant railway company, the terms of which were not yet settled, the facilities for carrying on such business having been demanded pursuant to sub-s. 3 of s. 60 of the Consolidated Railway Act of 1879; the plaintiffs having discovered that an agreement had been entered into between the two defendant companies to carry on an express business on said line, asked for and obtained a copy of the agreement between the defendant companies, which was more favorable in its terms to the defendant

express company than the draft agreement proposed by the defendant railway company to the plaintiffs; that shortly before the 10th November the defendant railway company notified their station agents who were acting as agents for the plaintiffs, that they must not act as such agents but they might act as agents of the defendant express company, thus giving the latter an unjust preference over the plaintiffs: that the plaintiffs then asked the defendant railway company to allow the said agents to act as such agents temporarily, but were refused on the ground that the defendant railway company were bound by their contract to allow their station agents to act for the defendant express company exclusively: that all the said agents informed the plaintiffs that they could not act as plaintiffs' agents, and would not on and after November 11th do any business for them: that the defendant express company commenced its business on 11th November, and on same day plaintiffs obtained an injunction restraining the defendant railway company from preventing their station agents acting as express agents for the plaintiffs, and to compel the defendant railway company to grant the plaintiffs equal facilities to those granted to the defendant express company, which injunction was dissolved on December 2nd on the ground that the defendant express company were not made parties to the proceedings: that the plaintiffs, under advice, postponed the signing of the agreement submitted to them by the defendant railway company, but offered, in the meantime, to pay the same as the defendant express company until the questions in litigation were settled: that on December 2nd, a few hours after judgment was given dissolving the injunction, the defendant railway company refused to allow the plaintiffs' messengers and freight on board their trains: that the plaintiffs tendered their messenger and freight on 3rd December and were again refused: that their freight has been refused at stations on the line: that the plaintiffs and their customers have been damaged: that the only reason given for the action of the railway company was

the refusal of the plaintiffs to execute the contract: the plaintiffs submitted that they were justified in refusing to execute the contract, as it differed from that between the defendant companies, more particularly if, as they seek to do, the agreement as to the exclusive employment of the station agents was made part thereof: that one of the terms of the proposed agreement was, that the plaintiffs should pay the defendant railway company more than they could make by their express business, if based upon fair rates to the public, and the plaintiffs' business would be carried on at a loss: the plaintiffs charged that the defendant railway company were bound to carry their freight and messengers upon being paid such rates as were just and reasonable, and the plaintiffs were willing to pay the same: that such rates have never been fixed by by-law of the company and approved by the Governor-in-Council, nor have the defendant railway company complied with the provisions of the "Consolidated Railway Act of 1879" in dealing with the questions raised as they were bound to do: the plaintiffs submitted that the railway company could only exact such rates as the Court found to be just and reasonable, and that the rates charged were unreasonable: that the plaintiffs demanded facilities, and were willing to submit to reasonable terms under the "Consolidated Railway Act of 1879": that they had been paying unreasonable rates under duress and claimed a refund and damages, and similar facilities to those granted to the defendant express company, and the right to have their freight and messengers carried, and that the portions of the agreement which conferred on the defendant express company exclusive privileges should be declared *ultra vires* and void, and claimed the usual express facilities for express freight on the trains, and a refund of the amount charged the plaintiffs less the amount fixed by the Court as a reasonable rate.

The statement of defence of the railway company admitted the first ten paragraphs of the statement of claim, and alleged that none of the station agents had

been required to act for the defendant express company, that they were free to decline to act for any company, and the only instructions given them were, if their other duties permitted them to act for any express company it was the desire of the company that they would act for the defendant express company exclusively : that the plaintiffs were a small company proposing to do business only on a small part of the railway about 200 miles, while their railway system embraces over 3,000 miles : that the head office of the railway was in Montreal, and they obtained the privilege of sending money parcels by the defendant express company all over the line free of charge, which was a considerable advantage to them, by permitting its agents to act exclusively for the defendant express company : that the plaintiffs, although asked to do so, declined to execute a similar contract to that between the defendant companies : that the employment of its agents is not a "facility" under the Statute : that they are only bound to grant "facilities" to an express company upon equal terms imposed upon other express companies, and the plaintiffs have refused to execute the contract referred to in the statement of claim on the ground that it was collusive between the defendant companies, and the rates were exorbitant : that the rates have been fixed by by-laws approved by the Governor-in-Council, under the "Consolidated Railway Act of 1879" ; and denied that the rates were unreasonable : that the rates charged afford a profit to the defendant express company and should do so to the plaintiffs, and would have done so if the plaintiffs had continued their old rates, but being desirous of getting all the business the plaintiffs lowered their rates and so interfered with the profit they would otherwise have made.

The defendant express company's statement of defence claimed the rights and privileges contained in their agreement, and the right to make arrangements with any one they could to act as their agents.

The matter in question, relating to the employment of station agents as agents of the plaintiffs, had come up

before in a suit in which the Vickers Express Company were the plaintiffs and the Canadian Pacific Railway Company were the sole defendants. An interim injunction was granted on November 11th, 1884, by BOYD, C., and a motion to continue the same was made and fully argued on November 27th, 1884, before PROUDFOOT, J., when

McCarthy, Q.C., and Creelman, appeared for the plaintiffs.

S. H. Blake, Q. C., and R. M. Wells, appeared for the defendants.

And the motion was refused and the injunction dissolved by the following judgment, on the ground that the Dominion Express Company should have been made a party.

December 2, 1884. PROUDFOOT, J.—Motion to continue injunction granted by the Chancellor on 11th November, 1884, restraining the defendants from hindering or obstructing or otherwise interfering with or preventing the station agents of the defendant company on the line of the Toronto, Grey, and Bruce Railway from acting as agents of the plaintiff company, and to extend the relief by granting a mandatory order compelling the defendant company, with respect to such agents, equal facilities on equal terms and conditions to those granted to the Dominion Express Company.

It appears that since the opening of the Toronto, Grey, and Bruce Railway, John Joseph Vickers, the now president of the plaintiff company, had the exclusive privilege of carrying express matter over that railway, and since the 1st January, 1882, the business was conducted under an agreement to continue in force for one year, and thereafter subject to be determined upon six months' notice in writing by either party.

The defendant company are operating the Toronto, Grey, and Bruce Railway under a lease, and on the 10th May last gave notice to terminate the arrangement with J. J. Vickers on the 10th November inst., (1884).

Subsequently to the 10th May, all the property of Vickers in connection with that express business was sold to the plaintiff company, who have taken possession thereof, and all the officers, messengers, and other employees of Vickers have been transferred to the plaintiff company.

The plaintiff company has been incorporated by letters patent issued under the provisions of "The Canada Joint Stock Companies Act, 1877."

The defendant company have made an agreement with the Dominion Express Company on the 1st January, 1884, for carrying their express matter, &c., on the Toronto, Grey, and Bruce Railway, and subsequently to that general agreement, another agreement was made between the defendant company and the Dominion Express Company, by which, in consideration of the Dominion Express Company carrying the money packages of the defendant company free on all lines operated by them, the station agents of the defendant company, wherever they might do express business at all, should act exclusively as agents of the Dominion Express Company.

Negotiations have been entered into by the plaintiffs with the defendants as to a contract for carrying express matter over the Toronto, Grey, and Bruce Railway, the defendants have submitted a draft agreement similar to the general contract they have with the Dominion Express Company, but it has not yet been executed.

The plaintiffs claim that the defendants are bound to grant to the plaintiffs equal facilities on equal terms and conditions to the facilities granted to the Dominion Express Company, and that the plaintiffs are entitled to have the station agents on the said line of railway in the employ of the defendants act as agents for the plaintiffs so long as they act as agents for the Dominion Express Company.

The defendants say that it is optional with the railway agents whether or not they should do express business. They are not required to act for either company. The defendants say to them, that if their duties will admit of it, and if they elect to do the express business for any

company, it shall be for the Dominion company—and this, the defendants are advised, is not inconsistent with the Railway Act.

The defendants object that the Dominion Express Company should be parties to this suit; and that until the agreement is executed between the plaintiffs and the defendants the plaintiffs have no *locus standi*.

I am inclined to think that the former of these objections is valid. It is true the Dominion Express Company may be added as a party to the suit. That, however, is not the question. That express company has, by contract with the defendants, a right to say that the station agents if they act at all shall act only for them. The present application is to give the plaintiffs liberty to employ these agents for them also. It is not a matter in which the defendants only are concerned. The Dominion Express Company should have a right to oppose any application that in its result would affect their arrangement with the defendants.

The plaintiffs have entered into no agreement with the railway company it is true, but they are now seeking to have one granting them equal facilities with the other express company, which the defendants refused to give them. The plaintiffs have a right to apply to the Court to enforce a right, if it be a right, given to them by the statute.

The principal question discussed was, whether the supplementary agreement between the defendants and the Dominion Express Company contained a grant of such facilities as the plaintiffs were entitled to share.

The Railway Act of 1879 (42 Vic. c. 9, s. 60, D.) under the heading "Traffic Arrangements," in the first and second sub-sections, deals with agreements between railway companies respecting traffic, and requires them to afford each other every facility for forwarding traffic, without preference or favour.

The third sub-section provides that, "Any railway company granting any facilities to any incorporated express

company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same."

The fifth sub-section interprets the word "Traffic," for the purposes of the four next preceding sub-sections, to include not only passengers, &c.

It cannot be doubted, I think, that an arrangement by which the express companies are allowed to employ the station agents of the railway company as their agents is a facility, and a very great facility, for their traffic. It is so sworn upon the affidavits on behalf of the plaintiffs and is not denied by the defendants as a matter of fact. When this privilege is refused the express companies require to employ an agent at every little station at a considerable expense, to do the work that can be done by the railway agents as well and at a much less cost.

The plan adopted by the railway company is ingenious, but the effect of it is to grant a privilege to one company that they refuse to the plaintiffs. On the order being sent by the railway company to their agents, the agents sent in their resignations; as pithily expressed by one of them, "the order is not compulsory but *we must*."

The defendants say that *traffic* is confined to the *receiving, forwarding, and delivering of traffic*, and that the action of the railway company does not interfere with this. The cases they referred to were decided upon the English Act of 1854 (17 and 18 Vic., c. 31), which requires the railway companies to afford all reasonable facilities for the *receiving, forwarding, and delivering of traffic* without any undue or unreasonable preference—a very different provision from an Act which requires *any facilities* granted to one to be granted to the rest. The cases relied on by the defendants were: *Pickford v. Caledonian R. W. Co.*, 1 Nev. & McN. 252; *West v. London and N. W. R. W. Co.*, L. R. 5, C. P. 622; *Re Beadell v. The Eastern Counties R. W. Co.*, 2 C. B. N. S. 509; and *Oxlade v. North Eastern R. W. Co.*, 15 C. B. N. S. 680.

None of them are precisely in point. That which was said by the defendants' counsel to be the nearest to the present was *West's Case*, *supra*, but the Court were equally divided and no decision was made. But the circumstances are very different from this. The railway company had leased their wharf used for storing coals to one coal merchant, and thus excluded others from the use of it. Under our Act that would doubtless have been considered a facility, as it was by Bovill, C. J., and Keating, J., even under the English Act. The other Judges considered that this was not an interference with the *receiving, forwarding, or delivering* of traffic under the English Act.

In *Pickford's Case*, the railway company allowed certain carriers a monthly credit while the plaintiff was compelled to pay ready money; the company's own agents were allowed to sort goods within the station, while the plaintiff was not; and that the company allowed their own agents two boxes within the station to keep books and accounts. An injunction was refused because the company might prefer their own agents, not being separate traders.

Beadell's Case was decided upon the ground of public convenience and the importance of keeping vehicles plying for hire in the station yard under the control of the company.

Oxlade's Case seems to have proceeded upon the ground that what was sought would be utterly subversive of the existing system of traffic, and that the colliery owners employed all the carrying power of the company.

It may be quite true that the plaintiffs could not compel the defendants to give the plaintiffs the use of their agents, but if the defendants allow their agents to act for one company it is a facility that cannot be denied to the other company.

As I have said, the Dominion Express Company are necessary parties to the suit, and the continuance of the injunction may inflict a material injury upon them, and that rather because, I think, the privilege is a valuable

one. So that I must refuse this motion, but without costs.

I have given my opinion on the questions argued before me, as it may, perhaps, prevent further litigation.

This present action was tried at the Spring Sittings at Toronto, on June 1st and 2nd, 1885, before Boyd, C.

Robinson, Q. C., McCarthy, Q. C., and Creelman, for the plaintiffs. The principal questions to be decided in this action are questions of law. The plaintiffs contend that the rates they are charged are unreasonable, and that they have not been afforded the same "facilities" by the railway company that have been afforded to the Dominion Express Company. The Railway Act of 1879, 42 Vic. c. 9, sec. 17 (D.), distinctly provides how tolls or rates are to be fixed, raised, or reduced, and approved of by the Governor-in-Council; how by-laws regarding the same are to be revised by the Governor-in-Council; and how payment of the tolls or rates are to be enforced, &c. Sec. 60, sub-s. 3, provides that equal "facilities" shall be granted to all express companies. The Court should decide whether equal facilities have been granted, and whether the tolls imposed are unreasonable. Mr. Justice Proudfoot has decided what are "facilities," and that they include the use of agents of the company. See *Wells v. Oregon and C. Ry. Co.*, 18 Fed. R. 667; *Re Marriott v. The London and South Western R. W. Co.*, 1 C. B. N. S. 499; *Hodges's Law of Railways*, 3rd ed. 663. Are the defendants, the railway company, bound to carry for reasonable rates or not? This case can only be argued against the plaintiffs if the section 60 of the statute over-rides the common law and furnishes a complete code of itself: *Hardcastle's Construction and Effect of Statutory Law* 163. Carriers were not bound to carry for *equal* rates under the common law: *Sutton v. The Directors, &c., of the Great Western R. W. Co.*, L. R. 4, H. L. 226, 237. It required a statute to enforce that; but no provision was required compelling them to carry for *reasonable* rates

for that is required by common law. A toll implies uniformity of compensation for equality of service: *New England Express Co. v. Maine Central Railroad Co.*, 9 Am. Law Reg. 728; *McDuffee v. The Portland and Rochester Railroad Co.*, 52 New Hampshire 480. The Court should enquire and fix what are reasonable charges: *Story* on Bailments, 5th ed. 508; *Crouch v. The Great Northern R. W. Co.*, 11 Ex. 742, per Alderson, B., p. 752; *Brown on Carriers*, 75; *Dinsmore v. Louisville Cincinnati and Lexington R. W. Co.*, 2 Fed. R. 465; *Fargo v. Redfield*, 22 Fed. R. 373; *Texas Express Co. v. Texas and Pacific R. W. Co.*, 6 Fed. R. 426; *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. 162. This line of railway has now been made a Dominion road by 47 Vic. c. 66, see sec. 20. The plaintiffs were at one time willing to sign a similar contract or agreement to the one made between the Dominion Express Company and the defendant railway company; but now the railway company's preferential action has opened the whole matter up. The two contracts when compared show they were not the same in terms: *The Canada Southern R. W. Co. v. The International Bridge Co.*, L. R. 8 App. Cas. 723, 732. It has been shown that there was sufficient business on the line of railway in question to justify express business, and the railway company must, therefore, perforce be carriers for the express company. Abundant evidence has been given to show *prima facie* that the rates charged are unreasonable, and the question of what are reasonable rates should be a matter of reference.

S. H. Blake, Q. C., and *Cassels*, Q. C., for the defendant railway company. As to the difference between the two agreements, the plaintiffs should have returned the one sent to them with a memorandum of their objections, and should not have refused to sign it. The evidence shows that the defendant railway company were willing to give the plaintiffs the same agreement as to terms that the defendant express company got. There is no law to compel a railway company to do express business at all. The

only place where express business is referred to is that in the Statute. It is a peculiar business and not covered by the general terms of the Act. It is left to the option of the railway companies to do or not, but if they do do it they must do it on equal terms for all. This is under the head of "Traffic Arrangements" in the Act. The position of the section serves to explain what "facilities" are and its scope. Mr. Justice Proudfoot's finding was a mere *obiter dictum*, and not a judgment. "Facilities" refers merely to traffic arrangements as to "receiving and forwarding and delivering of traffic." There is no obligation to carry express goods: *Sargent v. Boston and Lowell Railroad Corporation*, 115 Mass. 416, 421. It must depend on the bargain between the two companies. The cases cited as to the right to the express business rest on estoppel. The best test of the reasonableness of the terms offered to the plaintiffs is, that the defendant express company are willing and have now entered into an agreement on the same terms. The defendant express company have agreed to pay the minimum guarantee, although they know that another company may compete with them. The agreement made with the defendant express company extends over the whole of the defendant railway company's system, and in that respect differs from the agreement asked for by the plaintiffs. If the plaintiffs are entitled to any agreement, it must be to one similar to that granted to the defendant express company, and not limited to one part of the defendant railway company's line. There is no jurisdiction on the part of the Court to interfere with the rates at present: s. 17, sub-s. 11. This is not a matter to refer to the Master as to whether the rates are exorbitant; that should be settled, if at all, by the Court itself: *West v. London and North Western R. W. Co.*, L. R. 5 C. P. 622, 630-1. Traffic arrangements are the out-come of contract: *Evershed v. London and North Western R. W. Co.*, 3 Q. B. D. 134, S. C.—L. R. 3 App. Cas. 1029; *Great Western R. W. Co. v. The Railway Commissioners*, 7 Q. B. D. 182; *Man-*

chester, &c., R. W. Co. v. Denaby, &c., Co., 14 Q. B. D. 209 ; *Manchester, &c., R. W. Co. v. Brown*, L. R. 8 App. Cas. 703. See also the special Acts in connection with this railway company, 47 Vic. c. 54 and 61, (D.)

Moss, Q.C., for the defendants The Dominion Express Company. No one has any right to bring the defendant express company before the Court except for the purpose of altering their agreement, and that cannot be done in this action. The plaintiffs say they are willing to pay whatever my clients pay. Our agreement was made with the railway company before the plaintiffs had any rights as a company. "Agents" are an outside matter and apart from all arrangements as to the carriage of express goods.

Robinson, Q.C., in reply. The conduct of the defendant railway company was harsh and unjust. The plaintiffs have lost all their agents and their business is disarranged : *Hodges's Law of Railways*, 6th ed.. 474, 491. They had no time to complain or make any objections to the agreement because of the action of the railway company. They have the right to insist on the railway company doing express business. The case in 115 Mass. 416, is wholly opposed to all the later decisions since 1875.

June 2nd, 1885. *BOYD*, C.—I think I am in possession of this case sufficiently to dispose of it, though I may look at some of the authorities cited before making a final disposition of it. Substantially there are only two large questions to be dealt with, and they have been fully and ably argued. The first is, as to the right of the Vickers Express Company to complain as to the exorbitance of their charges ; and second, as to whether or not, under the arrangements made by the Canadian Pacific Railway Company with the Vickers Express Company and the Dominion Express Company, there has been, on the part of the Canadian Pacific Railway Company, any undue preference shown to the latter as against the plaintiffs.

Now, on the first question, as to whether or not there is the right to go into the consideration of what is

proper to be paid for the carriage of express goods, my opinion is against the right of the plaintiffs to go into that upon this record and in this way.

Possibly a very important part of the plaintiffs' case has been cut from under them by the fact that the question of collusion hinted at in the defence of the railway company is not open to them on this record. It may very well be if a case of collusion could have been established between the two defendant companies, that then the whole matter would have been open as argued by Mr. McCarthy and Mr. Robinson, but there is this obstacle to consider, that I cannot at present regard the bargain between the two defendants in any other light than as a *bond fide* arrangement between them, by which the express company obtained certain rights and privileges in regard to carrying goods over this line.

That bargain, also, was made, as Mr. Moss has pointed out, by an incorporated company before the plaintiffs were in the position of being an incorporated company. I am not able to say that there was collusion in that arrangement. The presumption is, that it is a matter of fair dealing between company and company, and regarding it in that light this is most cogent proof to show that what the Dominion company pays is a reasonable rate for the plaintiffs to pay.

Further than that we find that Mr. Vickers (who represents 495 of these 500 shares forming the stock of the plaintiff company, and whose evidence is of great moment as to the views he formed of what should be paid), after he knew the terms that had been agreed upon between the two defendants, expressed his willingness to submit to the same terms. In the box he said the same thing. Of course his counsel sought to protect the company which bears his name by saying that they did not agree to that, but the evidence preponderates in favour of the proposition that there is not such exorbitance, in reference to these terms of payment, as to justify me in finding for the plaintiffs. It is evident from what Mr.

McCarthy said, and from the facts of the case, that the real cause of this action was not the terms of payment proposed by the railway company, but that the plaintiffs' real complaint was that the railway agents were not allowed to act as the plaintiffs' agents along the line. If the agents of the railway company had been allowed to act indifferently between the two express companies we should not have had this action; but a preference having been given in that manner the parties necessarily went to law, and as they were going to law they thought they might as well litigate this large point as well as the other.

All of this litigation has arisen from that other reason and not because this was felt at the outset to be such an exorbitant demand as could not properly be paid. That is the way the evidence strikes me. It would need, I think, very cogent evidence indeed of exorbitance to induce the Court to embark upon an investigation and enquiry and an adjustment as to this amount, interfering as it would with the internal machinery and financial arrangements of this great railway company. It is a matter that the Court will not lightly enter upon, if there is jurisdiction at all, but I think the circumstances of this case and the evidence before me does not justify me, by any means, in coming to the conclusion that there was such injustice in this demand as to induce the Court to interfere as prayed.

In addition to the other evidence as to reasonableness there is this evidence, which has not been met in any satisfactory way, that there are a great number of parcels, valuable though small in bulk, conveyed, and there are other kinds of business transacted by the express company, such as the collection of and transmission of money and notes, which is not represented in the returns of bulk to the railway company, but out of which the express companies realize large earnings, and Mr. Van-horne stated that the requiring of a guarantee was one of the means by which the railway would get percentages on this business, as they were unable to check it in

any other way. This caused them to impose the guarantee of \$900.00, which one express company *bond fide* engaged to pay, and could be obliged to pay.

I am not called upon, therefore, to decide whether there was any unreasonable demand on the part of the Canadian Pacific in requiring that this express company should carry on the same terms as the Dominion Express Company. I think the case as to terms comes within the 3rd sub-sec. of sec. 60, 42 Vic. ch. 9 (D.); and the point before me to determine is, whether or not the railway company have afforded equal facilities to the two companies. I find no unjust demands on the part of the Canadian Pacific Railway Company, such as require the Court to modify the charges.

I do not think the case calls for that interference, irrespective of the point raised as to whether I have jurisdiction; my own opinion is, that there is no jurisdiction to deal with that question of terms as if they were on the footing of being tolls and charges, such as are mentioned in the other sections of the Act. My view is, that it is a matter of arrangement between the companies themselves as to the terms they shall agree upon. They are large concerns; they are not dealing as individuals or with individuals.

Persons have the right to travel on the terms of paying for themselves and baggage, but when the railway is going to deal with a corporate body, as an express company, then there is the prescribed mode of doing so as between two contracting parties. It is not necessary however to decide so much as that, because, I think, the evidence and the circumstances in this case do not require me to go so far.

On the second branch of the case my opinion is in favour of the plaintiffs' view, that there was preference shown in the way in which the Canadian Pacific Railway Company extended its facilities to the Dominion Express Company. The fact of there being a decided advantage in utilizing the local agents of the railway as express agents is well proved. Mr. Vanhorne's evidence is per-

factly conclusive on that point. He says, "It is a convenience to the Dominion Express Company and of some value to have our agents; they can arrange with them for less than with other persons. In some small places the depot is the centre of business, and this gives the office without any expense. Our agents could use without our objecting the company's safe for storing valuables for the express company. We could not allow the Vickers company to use our offices or safes if our agents were doing exclusive agency for the Dominion Express Company."

So we have a valuable—whether we call it a perquisite or a collateral advantage—we have a most valuable incident to this arrangement which was made between the two defendant companies in reference to the conduct and management of the express business. Now we find the Canadian Pacific Railway Company in their defence put this exactly upon that point. There is no such dealing with the matter as I think they were endeavouring to deal with it in the evidence, by putting in this letter of the 30th October showing that these were the instructions given to their agents. I think if the directions given to their agents shown in this letter of the 30th October had been uniformly observed and continued the Vickers Express Company would have no cause of complaint.

But the evidence does not corroborate that such were the instructions given. It is proved that in one instance or two the company's agents have been required to act for the Dominion company, but their pleadings say: "None of the company's agents have been required to act for the defendant company. They are, and always have been, free to decline acting for any express company. The only instructions given them by the defendant railway company were, that if their other duties permitted them to act for any express company it was the desire of the company that they should act for the defendant express company exclusively." But the desire was expressed a little more strongly and emphatically than was pleaded. Then they say in the 6th paragraph that,

"The defendant railway company submits, &c." They are not compelled, and no Court would pretend to compel them, to make their agents act for any other company; but what is complained of, and what is proved is, that they have not remained indifferent between the two companies—not impartial.

If they had retained the position indicated in their letter of 30th October, then, I think, they would have been indifferent as at that date, and by continuing that course they would have acted impartially as required by the Statute.

This letter says: "In reply to your * * to advise you one way or the other." That was precisely the position that the statute intended the railway company should take where there were competing express companies claiming advantages at their hands. They were not to show preference to one more than the other. It has been argued "facilities" do not cover the employment of station agents, but that point was considered in the decision of my brother Proudfoot in the former case between these companies, yet depending upon the same facts which are proved here, I agree with his view and adopt the reasons which induced him to come to that conclusion.

I do not think I can construe that sub-section as argued by Mr. Blake, viz., that "facilities" is to be read as modified or limited by the same word as used in previous sub-sections. In the second clause it says: "Every railway company shall * * afford all reasonable facilities * * for the receiving and forwarding and delivering of traffic." Now the "facilities" there are defined and confined to these three things. These are the same three incidents as to traffic arrangements which are referred to in the case cited of *West v. The London and Northwestern R. W. Co., L. R. 5 C. P. 622*, but when you come to the third sub-section it reads, any railway company granting "any facility;" now "any facility" covers "every facility," and it should not be limited by reading into it the words about receiving, forwarding, and delivering. And then, when you turn

over to sub-section 5 of that section 60, you find that it defines "Traffic" as including cars, trucks, and vehicles of any description adapted for running over the railway, and the word "Railway" includes all stations and depots of the railway.

Now we have the article of trucks brought into prominence in the evidence. The definition is not limited to what runs on the iron rails. Trucks and cars are vehicles which may run not merely on the iron rails, but at the stations and depots of the railway.

The railway includes these stations, and to manage stations you need agents, and so, as forming a part of the whole machinery there is no such absurdity as was suggested in defining facilities as including the use of agents.

The railway can itself interpret facilities when it grants to one company what it denies to another. Now the value of these agents, that is the value of the exclusive employment of the railway agents for use by express companies as their agents is shewn clearly in this; these agents have the right to use the company's trucks, vehicles, the company's depots, and baggage houses as the places for storing goods. They have also the right to use the iron safes which are there, the company's property: and the right to use all these passes with the employment of the agent when he is employed by any particular express company, so that you have this very property of the company, the carts, vehicles, and places for storing the goods which are admitted to be among the facilities for doing business for the company, you have all these embraced in this arrangement by which one express company can have their exclusive use to the detriment of a rival company.

Of course there is no compulsion when the favoured company gets the exclusive use of the railway agents. There is no compulsion literally, the man is not taken by the neck and told to act, but the fact of his not being perhaps very well paid induces him to seek money by acting for an express company, and it thereby becomes the strongest kind of compulsion when he is told he can add

to his income with the sanction of the railway company whose employee he is. The railway company says "now you need not act for any company, we do not object to you acting for an express company, but it is our desire that if you do, you should act for the Dominion Express Company."

Well there is no compulsion in the matter, but the result is thus arrived at more surely than by the strongest kind of compulsion. There is the golden bait held out before the man; and he is told "you can take that, but you must only take it from the one company," and he forthwith takes it, and brings with it to the favoured express company the railway company's safe, and trucks, &c.

Turn to the evidence and you find that case which occurred at Orangeville. The baggage master at Orangeville refused to allow the plaintiff's agents there to use the railway truck, and railway baggage-room for express purposes contrary to the previous custom of that place. I cannot suppose that he did so without having orders from his superiors, and although the use of them was afterwards granted, it was after litigation was threatened or commenced.

Another witness said Mr. Steele told him the company's agents would be required to act for the Dominion Express Company. This is what the pleader says was not done, that they did not require any of their servants to act, but this man was told he would be required to act for the Dominion Express Company, and therefore, he at once telegraphed his resignation to Vickers. Mr. Steele was not called to contradict that he did use this expression to this man, and I think it is proved. It would be a very simple thing, they could easily have called Mr. Steele if he could have contradicted what Mr. Smith said, so that we have affirmatively proved that the railway company actively intervened in procuring their officers to act for the Dominion Express Company, and in preventing them acting for the Vickers Company.

But it is said that the Dominion company give valuable consideration for getting this privilege as to the railway agents, and we are referred to some verbal arrangement, which is certainly somewhat mysterious in the manner of its negotiation. If on that account they are unable to grant equal facilities to other companies; if it is a contract or obligatory arrangement it works none the less to the prejudice of the competing express company and is an illegal bargain, as being in contravention of this third sub-section.

If the plaintiffs agree to carry money for the railway on the same terms as the Dominion company, I do not see that this by-bargain between the two defendants can be used to the disadvantage of the plaintiff company.

I think it is an agreement that cannot be enforced at the expense of the Vickers Express Company; and being an infringement against this provision of the Act, it was necessary to bring the Dominion Express Company here to have a declaration of that invalidity as against the plaintiffs. I think that the railway have erred in not leaving the matter at large for their agents to act for which company they please, as expressed in this letter of the 30th October; and if I retain that view on further looking into the case the result will be, that I grant the plaintiffs relief on that part of the case declaring that there had been a preference, and referring it to the Master to ascertain the damages they sustained by the railway refusing to take their goods on the 2nd and 3rd December, and give them the costs of the action so far as that is concerned, but dismissing the case with costs as to all the other matters.

The costs of the Dominion Express Company should be paid by their co-defendants.

I give costs to the Vickers Express Company because I do not think it was in consequence of any dispute about the terms of this contract they were to sign that the railway refused to carry their express freight, that was merely a minor feature. The Canadian Pacific Railway Company

placed their real reason plainly upon this ground by their letter and telegram, in which they state that this employment of their agents is a collateral matter, and will have to be settled by the Court. If I am right in my finding the defendant company were wrong at that time, and that it was their taking such a stand which induced the plaintiffs to begin these proceedings, and inasmuch as this was one of the terms which the Vickers Express Company were not obliged to submit to, I think they were doing right in coming to the Court.

Robinson, Q. C.—I suppose the injunction will be continued.

Boyd, C.—It will be referred to the Master to settle the terms of the agreement if you cannot agree between yourselves, and in the meantime they should receive your goods on equal terms with those of the other company.

June 11, 1885. *Boyd, C.*—I have further considered my judgment, and see no ground to change it.

G. A. B.

[CHANCERY DIVISION.]

IN RE THE CORPORATION OF THE TOWN OF OAKVILLE, AND
ROBERT KERR CHISHOLM, AND WATER STREET, AND
THE JUDGE OF THE COUNTY COURT OF THE COUNTY
OF HALTON.

R. S. O. ch. 111 sec. 84—Amending plan by person not an “assign”—Prohibition to County Court Judge.

W. C. being the owner of certain land conveyed away his interest in it to F. & Co., in March 1836. In August 1836 a plan of the town, including this property, was prepared, apparently at his instance, and was registered by his executors in January 1850. R. K. C. became the owner in 1857, through a conveyance from F. & Co., and applied to the County Court Judge to amend the plan under R. S. O. ch. 111 sec. 84, by closing a street. In an application to restrain the County Court Judge from proceeding with the application, it was *Held*, that R. K. C. was not an “assign” of the person making the plan within the meaning of the statute, for F. & Co., through whom they claimed, acquired title before the plan, and a prohibition was granted.

THIS was an application by the corporation of the town of Oakville, for a writ of prohibition directed to the County Court Judge of the County of Halton, and Robert Kerr Chisholm, to prohibit and restrain the said County Court Judge from proceeding with or from hearing or adjudicating in a matter of the application of the said Robert Kerr Chisholm to amend the registered plan of the town of Oakville, filed in the registry office for the County of Halton on the 12th day of January, 1835, to close up a portion of a street laid out thereon called “Water Street.”

The application was heard on April 14, 1885, before Proudfoot, J.

Affidavits were filed and read on both sides, upon which, with the admissions made by counsel, the facts set out in the judgment were found.

J. K. Kerr, Q.C., for the application. The owners dedicated the street to the public by the plan, and the plan has been adopted. The County Judge has no authority to rescind such dedication. R. S. O. ch. 111, sec. 84, does not apply to this case. This street has become vested in the

municipality : Consolidated Municipal Act of 1883, sec. 524. The effect of closing it would be to deprive the municipality of the property with no provision for compensation. Even the council could not close it up without observing the formalities prescribed by sec. 546 of the Act of 1883. See also sec. 550, and *The Corporation of Wyoming, &c. v. Bell*, 24 Gr. 564.

Tizard, contra. The corporation appeared on the application before the County Judge and have waived any objection to his jurisdiction. This is a case that is fully covered by R. S. O. ch. 111 sec. 84. The evidence shews no plan was registered by Col. Wm. Chisholm while he owned the property, but it was by his executors, and has been recognized since by Robert Kerr Chisholm, and he should be considered an "assign" of Wm. Chisholm. The street is not vested in the corporation as they have never done anything on it : *Waldy v. Burlington*, 7 O. R. 192 ; *Re Dixon and Snarr*, 6 P. R. 336.

Kerr, Q.C., in reply, referred to *Rossin v. Walker*, 6 Gr. 619 ; *City of Toronto v. York*, 6 Gr. 525 ; *Attorney General v. The Municipality of the Town of Brantford*, 6 Gr. 592 ; and *Re Morton v. The Corporation of St. Thomas*, 6 A. R. 330-4, which latter case he contended was not adverse to his contention here, as it was the closing of a lane, and lands are not vested in the municipality.

April 22, 1885. PROUDFOOT, J.—This is an application for a writ of prohibition to, or for an order restraining the Judge of the County Court of Halton from proceeding or further hearing or adjudicating in the matter of the application of R. K. Chisholm to amend the registered plan of the town of Oakville filed in the registry office for Halton on January 12th, 1850, to close up a portion of Water street &c.

The lot on which the street in question is situate was granted to Col. W. Chisholm in 1831. On the 10th of February, 1832 he mortgaged it to Forsyth and others, and on the 7th of March, 1836, he released to the mortgagees his equity of redemption therein.

In May, 1852, Forsyth and others conveyed the same to R. K. Chisholm and Thompson Smith, and in January, 1857, Smith conveyed his interest to R. K. Chisholm.

On the 1st August, 1836, a survey and plan of the town of Oakville was made by R. W. Kerr, D.P.S., apparently at the instance of Col. Chisholm, and which was registered by his executors on the 12th January, 1850.

It is not shewn that Col. Chisholm or his executors had any title in the land when this plan was prepared and registered.

The R. S. O. ch. 111 sec. 84 allows an amendment of a registered plan to be made by the Judge of the County Court at the instance of the person filing or registering the same or his assigns. The applicant says he has bought and sold lots upon Water street according to the plan and to that extent has adopted it, but has not made any such on the part of the street he seeks to have closed.

A plan, made by a person who did not own the land would be valueless, and no registration of such a plan could affect *per se* the title of the owner. The plan made by Col. Chisholm could not bind Forsyth & Co., and Forsyth & Co. were not the assigns of the person making the plan, for their title was prior to and paramount to the plan. R. K. Chisholm can be in no higher position than Forsyth & Co. from whom he purchased. He is not therefore *an assign* within the meaning of the statute.

Upon this ground I think the proceedings before the County Judge must be prohibited or restrained.

I do not therefore find it necessary to consider the question of dedication which was discussed before me. Nor by my present order do I determine that R. K. Chisholm may not have a title to the street. I only decide that this is not a case which the statute authorizes to be adjudicated upon by the County Judge.

I therefore make the order for a prohibition, with costs against R. K. Chisholm.

G. A. B.

[CHANCERY DIVISION.]

IN RE LAKE SUPERIOR NATIVE COPPER COMPANY.
(LIMITED.)

RE PLUMMER.

Foreign company doing business in Ontario—Winding-up—45 Vic. c. 23 (D.)—47 Vic. c. 39 (D.)—Ultra vires—Creditor proceeding against foreign assets—Injunction—Effect of staying proceedings at debtor's request.

A winding-up order under 45 Vic. c. 23 (D.), winding-up a foreign company doing business in Ontario, made by one Judge, will not be set aside by another. An application for that purpose must be made to the Divisional Court.

After a winding-up order had been made, P., a resident of Ontario, brought an action against the company in the State of Michigan, with a view of attaching a steamer wintering there, which was the property of the company. It was shewn that representations that the company was perfectly solvent had been made by both the secretary and managing director to P., and P. swore that but for these representations he would have taken proceedings before he did, which might have enabled him to obtain a judgment before the winding-up order was made.

In an action for an injunction to restrain P. from proceeding with his action in Michigan, in which it was shewn that other creditors of the company, who were residents of the United States, and so not within the jurisdiction of the Court, were also proceeding against the steamer. It was

Held that this case could not be distinguished in principle from *Ex p. Railway Steel and Plant Co.—In re Taylor*, 8 Ch. D. 183, and the continuance of the injunction, which had been granted *ex parte*, was refused.

THIS was a motion by John M. Martin, the Canadian liquidator of the Lake Superior Native Copper Company (Limited) to make perpetual an injunction granted *ex parte* against one W. H. Plummer, a creditor resident in this Province, restraining him from prosecuting certain actions in the Circuit Court of the county of Chippewa, in the State of Michigan, one of the United States of America, in which actions he was seeking to attach the steamer "J. W. Steinhoff," the property of the company, wintering in Michigan.

The company was incorporated by Imperial Charter, and had obtained a license under 43 Vic. c. 19, (O.,) and had been carrying on business and possessed assets in Ontario, and an order to wind it up had been made under

the Acts 45 Vic. c. 23, (D.), and 47 Vic. c. 39, (D.), under which the applicant was appointed liquidator. Prior to the making of this order the company had gone into liquidation in England.

Plummer resisted the motion upon various grounds, which are fully stated in the arguments and judgment, and, pending the motion, presented a petition to rescind the order winding-up the company, on the ground that the Court had no jurisdiction to make such an order, the company having been incorporated by Imperial Charter.

This petition was presented in aid of Plummer's resistance to the main motion.

The motion and petition were argued together on April 14th, 1885, before Proudfoot, J.

H. J. Scott, Q. C., for the Canadian liquidator. Plummer being within the jurisdiction of the Court, having control of the liquidation proceedings, will be restrained from proceeding against foreign assets: *In re International Pulp and Paper Co.*, 3 Ch. D. 594; *In re Oriental Inland Steam Co.*, *Ex p. Scinde R. W. Co.*, L. R. 9 Ch. 557; *In re South Eastern of Portugal R. W. Co.*, 17 W. R. 982; *Maclaren v. Stainton*, 16 Beav. 279; *Joyce's Law of Injunctions*, 1029. The fact that other creditors whom the Court cannot reach are proceeding against the assets cannot affect this. If on this ground Plummer is allowed to proceed, it should be upon his undertaking to account for what he may receive. As to rescinding the winding-up order, no Judge other than the one who made it has jurisdiction. The case of *Merchants Bank v. Gillespie (a)*, in our Supreme Court, is not similar to this, as that was decided upon an Act of 1882, and the opinions of Strong and Henry, JJ., are mere *obiter dicta*. When all the facts were before the Judge who made the order, it cannot be said to be made *per in curiam*, because a subsequent decision is opposed to it. This company having taken out a license in Ontario, becomes subject to Canadian law: *In re Matheson Brothers* 27 Ch. D. 225.

(a) Not yet reported.

Shepley, for Plummer. The granting of an injunction in such a matter as this is purely within the discretion of the Court: *Jones v. Geddes*, 1 Phillips 724; *The Carron Iron Co. Proprietors v. Maclaren*, 5 H. L. C. 416; *Ex p. Railway Steel and Plant Co., Re Taylor*, 8 Ch. D. 183. The injunction should not be granted under the circumstances of this case. Other creditors who cannot be restrained are realizing against this property, and my client should be allowed to share with them. Owing to Plummer's delay at the company's request, this case comes within the principle of *Ex p. Railway Steel and Plant Co., Re Taylor*, 8 Ch. D. 183. The cases *In re Oriental Inland Steam Co.*, L. R. 9 Ch. 557; *In re International Paper and Pulp Co.*, 3 Ch. D. 594; and *In re Matheson Brothers*, 27 Ch. D. 225, discuss the general question, and shew the principles upon which the Courts deal with foreign assets upon a winding-up. The original winding-up order should be rescinded, as the judgment of the Supreme Court in *Merchants Bank v. Gillespie (a)*, holds the Act to be *ultra vires*, and the Judge making the order had no jurisdiction to do so. It is not necessary to appeal from it, as Plummer was not a party to the application, and his proper course is to move on petition to set it aside.

G. M. Rae appeared for the English Liquidator of the company upon the motion to set aside the order.

April 22, 1885. PROUDFOOT, J.—This company was incorporated under the English Joint Stock Acts.

An order was made by my brother Ferguson on the 3rd of February, 1885, to wind up the company under the the Dominion Act 45 Vic. c. 23 (D.), and the amendments thereto (47 Vic. c. 39, D.)

A copy of this order was sent by post on the 7th of February, 1885, to Messrs. Kehoe & Hamilton, of Sault Ste. Marie, the solicitors of Plummer, a creditor of the company, in an action in which he had recovered judgment against the company for \$5,386.40, and who also had a claim against the company for \$4,900 on an account stated.

(a) Not yet reported.

On the 11th of February, 1885, Plummer brought an action in the Circuit Court of the County of Chippewa, in the State of Michigan, to recover both sums. He assigned the claim for \$4,900 to his brother on the 14th February, 1885, and to that extent the action is being prosecuted for his brother's benefit.

An injunction was granted *ex parte*, restraining Plummer from prosecuting his action against the company.

A motion is now made to continue the injunction.

Mr. Plummer, however, has presented a petition asking to have the winding-up order rescinded, as having been made *per in curiam*.

The ground for this petition is in the judgments of some of the Judges of the Supreme Court in the case of *Merchants Bank v. Gillespie*. That case decided that the 45 Vic. c. 23 (D.), did not apply to English corporations. Mr. Justice Strong expresses a decided conviction that even if the Dominion Act had expressly applied to English corporations it would have been *ultra vires*, and Mr. Justice Henry agrees with him. The other members of the Court seem to have confined their observations to the case then before them, viz., the construction of the 45 Vic. c. 23, (D.)

The winding-up order in the present case was made not only under the 45 Vic., but also under the 47 Vic., c. 39, (D.), which declares that the Act shall apply to incorporated companies of certain specified character, which include the present company, "no matter where incorporated, and which are insolvent or in process of being wound up."

My brother Ferguson seems to have been of the opinion that this Act of the Dominion was not *ultra vires*. It certainly has not been so determined. There is no doubt the opinion of two eminent Judges of the Supreme Court is, that such an Act is beyond the power of the Dominion Parliament to enact. It is possible, perhaps it is probable, that this opinion may be correct. But if so, it is not in my power to set aside the order made by my brother Judge. It is justified by the language of the statute, and he was acting in pursuance of that statute when he made the order.

I therefore do not think the order can be set aside, unless by the Divisional Court. And I express no opinion as to the power of the Dominion Parliament to pass such an Act.

I dismiss the petition, with costs.

The debt in this case is purely a Canadian debt. The creditor has no right to the ship *in rem*. The creditor is a resident in Canada. The 45 Vic. c. 23, s. 20, (D.), enacts that when the winding-up order is made, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with leave of the Court, and subject to such terms as the Court may impose.

It was said that there are other creditors in Michigan not amenable to the jurisdiction of this Court, who are also suing the company, and will obtain judgment, and realize upon the assets in Michigan, to the prejudice not only of Plummer but of the company. As was said by James, L. J., *In re Oriental Inland Steam Co.*, L. R. 9 Ch. 557, there may, no doubt, be some difficulty in dealing with assets and creditors abroad. In that case the Oriental, &c., Steam Ship Company, and the Scinde Railway Company were both English Companies having their chief offices in England, but carrying on business in India. The Railway Company obtained judgment in India, and some months afterwards an order for winding up was made in England. After that the Railway Company came in under the winding up, and proved their debt, but nothing turned upon this fact. And having attached property in India they were finally required to pay the amount realized out of it to the liquidator. Here Mr. Plummer has not proved in the winding-up, and if it rested merely on the fact of his suing in Michigan after the winding-up order, under an apprehension of foreign creditors getting priority, I would be inclined to give him the option of having the injunction continued, or of prosecuting the action and undertaking to abide by any order the Court might make. See *In re South Eastern of Portugal R. W. Co.*, 17 W. R. 982, where an action by a creditor against assets of a company in a foreign country was restrained.

But the case does not rest there, for it appears that in May or June, 1884, the amount due to Plummer was ascertained between him and Stuart, the manager of the company, to be \$9157.91, exclusive of some items of account not then reckoned; and Plummer was assured by Stuart that the company was in perfectly solvent circumstances, and that the account would be paid in full as soon as the accounts of the company were adjusted. These assurances were repeated more than once by Stuart, and they were also made by Norris, the secretary of the company, in June and July, 1884. In August, Plummer was paid £1,000 from England on account, and he was requested by Norris to draw upon the company in England for the balance of his claim. In August, Stuart authorized him to draw on the company in England for the balance of his claim, which he did, and the draft was accepted by the company on the 8th September, 1884, at 90 days, and it was protested for non-payment on 10th December, 1884. Stuart's assurances were repeated down to the month of October, 1884. Plummer swears that it was his intention to enter an action in June, 1884, for the recovery of his claim, and that he would have done so but for the assurances made to him by Mr. Stuart: and that the repeated assurances he received were the sole cause of his delaying the commencement of the proceedings till the 16th December, 1884, when he issued the writ of summons, and but for this delay he might have recovered judgment before the winding-up order.

I cannot distinguish this case in principle from *Ex parte Railway Steel and Plant Co.—In re Taylor*, 8 Ch. D. 183. There it was held that the postponement of the proceedings in an action, having been made in pursuance of a request made on behalf of the company for time, the creditor was entitled to the benefit of his judgment in priority to other creditors. The application for time in that case was made by the secretary. Here the representations were made not only by the secretary but by the general manager of the company, and were

calculated to, and had the effect of, delaying proceedings against the company. It was urged in *Taylor's Case* that the secretary had concealed from the directors that the writ had been issued and that the action was pending, but Hall, V. C., would not allow it to be contended that the company did not know what was going on. The language of the V. C. in giving judgment is, that the Winding-up Act of 1862, s. 163, making an action after a petition for a winding-up void, does not make it absolutely void, but it is to be taken in connection with s. 87 (the same as our 45 Vic. ch. 23, sec. 20 D.), thus leaving in the Court a discretion to be exercised, and that the creditor having delayed at the request of the secretary was entitled to be preferred.

The nature of the items of the plaintiffs account being for groceries, general supplies, and wages of men at the mines at Mamainse paid by him, and but for such supplies and wages paid by him the work could not have been carried on during the past year, and the acknowledgment of the liability by the general manager and the secretary, render the plaintiff's claim an eminently just one, and one that deserves every consideration that can be given to it.

Under these circumstances I think I must decline to continue the injunction, and refuse the motion, with costs.

G. A. B.

[CHANCERY DIVISION.]

THOMPSON ET AL. V. THE CANADA FIRE AND MARINE
INSURANCE COMPANY ET AL.

*Directors—Consent to transfer of shares—Fraud—Breach of trust—
Powers of directors—Liability.*

On an appeal from the judgment of BOYD, C., reported 6 O. R. 291. *Held*, (reversing the judgment of BOYD, C.) that the defendant directors in allowing the transfers complained of, were upon the evidence guilty of no fraud towards the shareholders, and that such act was within the scope of the prescribed powers and duties of directors, and as neither fraud nor a breach of trust was proved, the cross-appeal was allowed, and the action dismissed with costs.

THIS case (reported *ante*, 6 O. R. 291) came on by way of appeal and cross-appeal to the Divisional Court, from the judgment of BOYD, C., and was argued on February 14th, 16th, and 17th, 1885, before BOYD, C., and PROUDFOOT and FERGUSON, JJ. That portion of the Chancellor's judgment which was not reported in 6 O. R. 291 is given below, (a.)

(a) In this case, tried before BOYD, C., at Toronto, December 3rd, 4th, and 5th, the following oral judgment was delivered at the conclusion of the trial :

It appeared to me at the outset of the case, that as the company was in liquidation and the liquidator was before the Court, the rights of the parties and all useful purposes would be served by my making such declarations as will guide the liquidator in the administration of the estate. Therefore I do not much regard the form in which the thing is put before me. Substantially the whole contest is before the Court. Practically the company's claim and the company's control are in the hands of the majority who did the act, which is now complained of. Although a good deal of time has been occupied in getting at the facts, I think that all the substantial and material facts may be compressed within a small compass. First, with reference to the state of affairs at the time the transfer of the stock was made. Now, there has been a good deal of evidence about the state of the company at that time ; and perhaps a fair result of the whole would be to say that the company was not in a desperate condition ; it was not insolvent, perhaps not on the eve of insolvency ; but it had been going backward, and it was by no means flourishing. And I think the condition of the company was brought pointedly before the directors—certainly before the attention of the Executive Board—by Mr. Waldie's report. Although

Mackelcan, Q.C., and *Moss*, Q.C., for the plaintiffs
The action is brought for an indemnity for the loss caused by the transfer by certain directors to one Cameron, a man of no means, of a large amount of stock in the defendant company, upon which only ten per cent. had been called in, and there was a consequent unpaid liability of

it may be true that the report is not left in the hands of the company, but is kept by Mr. Waldie, so that no importance is to be attached to it as fixing the shareholders with any knowledge of it, it certainly was brought to the attention of the directors and the Executive Board, in whose hands they left the concerns of the company ; and I think it may fairly be said, looking at that report and having regard to all the circumstances, that there was a crisis in the affairs of the company at that time. I think that is the fair result, even according to the defendants' own evidence. They recognized the fact that the company had been going back : they had parted with their former manager, Waldie : they were in difficulty about getting a new manager : the company had not recovered from its losses ; and, altogether, they were in a dilemma as to what to do. I think it was a crisis which presented itself for them to deal with at that moment ; and perhaps Mr. Waldie's report is perfectly correct in indicating the only possible steps that could be taken if the company were going on at all. Unless they were going to stop and wind up ; the only possible steps that could be taken were as indicated in his report. I think the evidence all leads to that. The first suggestion of Mr. Waldie is to extend the business. He suggests a scheme—I need not refer to it more particularly now—but it involved making a call. The second advocated a concentration of the business, but a vigorous prosecution of it, and based also on the necessity of making a call. So either of these alternatives required a call. The third was the one which was followed by the directors—which he disapproved of—but which was really the only alternative open to them if they were going on : and in the words of his report that was “ 3. For the company to go on as at present, and trust to luck and better times.” This he disapproved of ; but that, after weighing all the circumstances, commended itself to the directors, because they thought it was unadvisable to make a call at that time, and they thought that with the assets in hand, if times were reasonably good, they might prosecute the business, if they could get a good manager to take the control of the affairs. Now, I have said once, and I repeat, that I exculpate the directors from any fraud in the opprobrious sense of that term. They were acting with a view to the interests of the company in what they did. I think it is impossible to look at all the evidence and fail to see that that was what influenced them to a certain extent. I think they failed to regard all the matters which should have entered into their consideration. In making this appointment they had reached a point in the affairs of the company when something had to be done ; and what they resolved to do was this : to make what seems to me—and I speak with great diffidence

ninety per cent., and the result of which transfer was to double the liability of the paying shareholders. These directors really transferred a liability not a property. Large losses made in the St. John fire nearly crippled the company, but the business was carried on in the hope of getting over them. The directors should not have consented to

because I do not know so much about these matters as many of the witnesses who were examined—but it seems to me that they resolved on making what was a radical change in the affairs of this company; that is to say, they were embarking on a scheme by which they were to place the control of the company pretty much in the hands of one man, and that the manager. It may be that the manager saw that the position of the company enabled him to make his demand at that time. The evidence, so far as I can see, all indicates that he broached the matter: he originated it. They after consideration favoured his scheme, which was this: to transfer to him such a quantity of stock—\$350,000 worth—as would give him the control in the affairs of the company, as would enable him to carry out the policy that seemed best to him. And they procured that stock by turning over to him what was in their hands and the hands of some others who are not before the Court now, but who were all, I believe, directors,—so as to give him this control which was the condition on which he was going to take the management of the company. Now, I think that was a change in the control and management of the concern, which was little short of radical. It was divesting themselves of the controlling amount of stock, which the directors heretofore had, with the exception of enough, which they retained, to qualify themselves as directors: because it was part of the scheme that they should be directors. They retained only enough stock to qualify themselves, and turned over the rest of the stock, which gave a controlling interest, into the hands of Mr. Cameron. Now, it seems to me, with the light I have upon the evidence and what little knowledge I have of these matters, that it was a most unfortunate thing that they did not take the company—the shareholders, I mean—into their confidence: that they did not present this thing to them fully, stating the difficulties that environed them, and stating this solution of the difficulty which commended itself to them, namely, to put Mr. Cameron into this position; and taking the shareholders into their confidence, got a vote, an expression of opinion, as to this change of policy on the part of the company. However, it seemed good in their eyes not to do that. They appeared to have such confidence in Mr. Cameron, such flattering views of his status and his ability to carry the thing through, that they thought it would go on all right. I do not blame them for making this change in the management of the company. They were materially interested, and thought it was a good move; but I think at this point of the case their duty conflicted with their interests. They must have had present to their minds—some of them admit that they had present to their minds—that by divesting themselves of this stock they divested themselves of so

any transfer of stock to Cameron let alone transferred their own stock to him : 32 and 33 Vic., c. 13, s. 83. These transferring directors were a majority of the board, and they with Cameron controlled the most of the stock. The directors being trustees for the body of the shareholders were guilty of a breach of trust when they consented to the trans-

much liability. It cannot be overlooked that the company was not in a flourishing state. They must have conjectured upon what the future of the company would be. If disastrous, calls would have to be made ; and if prosperous, of course nothing of that kind would have occurred. But whether they did look simply at the bright side of the picture, and not at the dark, is immaterial so far as the disposition of the case is concerned. It was their duty to have regarded both sides. They were there as directors, with certain powers, with certain responsibilities. They knew—each one of them must have known—that by the terms of the Statute stock could not be transferred without their assent. They must have known the clause of the statute which has been referred to. The case referred to by Mr. McCarthy does not govern the present. In that case it was a transfer of stock from one who was a director, to a shareholder. It was only saying whether he should have a larger amount of stock or not. But here they were taking their stock, which controlled the company, and giving it to Mr. Cameron ; regarding whom it was of the utmost importance, it seems to me, that they should obtain his financial standing. If the matter of a transfer by individual shareholders to Mr. Cameron of this large amount of stock had been presented to them for their sanction, it would have been their duty as directors to ascertain the position of the person who was going to take this stock. It would have been their duty as directors to see that he was a solvent person, able to pay all the calls that might reasonably be expected to be made on the stock he was about to possess himself of. They did not take such a precaution in this case. It would have been their duty if the transfer had been by others : it was essentially their duty when it was their own stock they were dealing with, and divesting themselves of the control of the company by turning it over to Mr. Cameron. Now, if they had put their heads together they would have ascertained that the position of Mr. Cameron was not such as some of them seemed to have imagined. Some of them estimated in their minds that Mr. Cameron's financial position was somewhere about \$50,000 to the good : but one of them, and he the one who states himself to be the most intimate friend of Mr. Cameron—Mr. Smith—had the belief, based upon the enquiries which he made, that he was only worth from \$10,000 to \$15,000. Now, if the directors had all come together and discussed it at the Board, as one would have expected, they would have found that they differed in their estimate of this man. One would have said "He is worth \$50,000 ;" and another would have said \$10,000 ; and that would have given rise to enquiry. If they had taken that step, and if they had made the enquiry

fer of the stock to a man of straw. In this case the majority of the board transferred their stock at the same time, and they voted for the consent to the transfer outvoting the minority of the board who resisted it. All the defendants except the company are directors, no outsider having got the benefit of any transfer. The evidence shows that the

which I think it was their duty to do, instead of going blindly forward on the supposition that all was right, the result would probably have been very different. I do not think they should be relieved when it is found out that they closed their eyes against light which would have shown them that they were doing wrong, by the simplest enquiry.

I incline to think that, if the question had been put point-blank to Mr. Cameron, he would have told them precisely his position: that he was worth from \$5,000 to \$7,000. He was worth that and no more. The directors all knew that he had no tangible property in the shape of estate, or lands, or anything of that kind; it was all in money—portable. They knew that he was not a man of substance in the sense of having estate and property; and they might have found out—and in my view it was their duty to have ascertained the fact—that he had only some \$5,000 or \$7,000; in other words, that when he had paid the twenty per cent. which it was stipulated he was to pay for the stock which was to give him the control of the company, he would practically have spent every cent he had in the world. He would then, without means, have been put in the position of manager, with this large amount of stock; and so far from being able to pay a call he could not pay the tenth part of a call, had it been required from him. So, that, I may say, without any intention to use the term in any improper way, he was a man of straw. The directors admit, and it cannot be controverted, that had they known he was only possessed of this small amount they would not have handed over this stock. However, it seems to me that if they did not know it, if they did not take the means to know it, they are just as culpable as if they did know it. There was their failure to discharge their duty aright. It was, in my view, a breach of trust to carry out this transaction of the transfer, as they did, without satisfying themselves that they were giving the stock to a person of substance who was able to meet all demands upon it. I do not take the extreme view of the case which was argued by Mr. Bethune, that the statute is of such a nature that the directors, being interested, should not transfer, that they were incapacitated, and that the whole transaction is utterly void. I think, putting it at the highest, it is just such a transaction as very often occurs in ordinary matters between trustee and *cestui que trust*. He could purchase; but he must be prepared to show that he purchased on such terms as realized the full real value of the property, and on such terms as could have been obtained from any body else. I think that is the true touchstone to be applied to this action. They failed in their duty; they transferred to a man who was not a substantial man: but it was not a transaction void *ab initio*, though

plaintiffs cannot be said to have acquiesced, for the transfer to Cameron was prearranged by the defendants. One of the directors Dr. Vernon protested against it at the time, but it was carried by a vote of eleven to six. The plaintiffs' appeal from the part of the Chancellor's judgment, which deals with the acquiescence. [BOYD, C.—Dr. Vernon said in his evidence

voidable—one which if presented to the shareholders they had the opportunity to ratify or reject. Now, what was done? I say again, it was most unfortunate that this transaction was not spread out on the report, and brought in that way before the shareholders. They did not do so. From the directors' point of view they were perhaps acting in the best interests of the company, to secure a manager. I cannot disregard all this evidence that he was a cautious, careful, prudent business man, and they thought they were doing well. From the directors' point of view they were probably acting in the best interests of the company. From the shareholders' point of view they were by no means acting in the best interests of the company; because this man could not have answered these calls. They were putting a liability on their shoulders which they would not have accepted had they known it. The next thing of importance is, that a report was prepared, setting forth the appointment of Mr. Cameron to the position. Mr. Moss's argument throughout on that commended itself to me as very forcible, and, indeed, unanswerable. Therein was not stated the terms on which they accepted Mr. Cameron; it was not stated what they did and why they did it; so as to have had a full, fair and free expression of opinion on the part of those assembled, as to whether they were going to continue the company on those conditions or not. Mr. Cameron was appointed, and all the rest was left to be elicited by a sort of side discussion which took place towards the close of the meeting, after the report had been adopted. Now, I really have no very clear idea myself, upon the evidence, as to what precisely was stated at that meeting; as to what was discussed; as to how full details were given, or the reverse. I am in doubt as to whether the expression "man of straw" was used at that meeting or not. All I know is this: that there was some disclosure made of what had been done, and there was some dissatisfaction expressed at the action of the directors. It strikes me at present that the principle to be applied to the case is this—and I do not know that I can go any farther in the case than to give such a direction as may guide the liquidator in adjusting the rights of the parties, and what I say now is subject to alteration if I find reason to change my opinion after further consideration. It occurs to me now that if there was a disclosure made of the details of this transaction, of the transfer, made to the persons at that meeting, or if they otherwise were informed of it, as Mr. Finkle appears to have been by one of the witnesses who was called—if the shareholders were aware of the details of this transaction, and were content to let the transfer remain; or even simply objected to it in words, and did nothing; the fact that the business of the company

that "all were satisfied with the first year's business under Cameron," but it seems when the business fell off and a change took place in that respect, a change took place in their feelings as to the transfer.] Yes, the plaintiffs had no objection to a good business, and if it had kept up, they would have suffered no loss, and if they had suffered no loss there would have been no litigation, as they had no right to complain until they were damnified. They do not say now, that they object to Cameron as manager, but they do as a shareholder. [PROUDFOOT, J.—But did not the plaintiffs know of the arrangement by which Cameron was to become such a large shareholder before he became manager?] No; they did not know of the arrangement by the directors until afterwards. [FERGUSON, J.—But when they did know they took their chance of the prosperity of the company,

was prosecuted for two years after that, they knowing all the arrangements which had been made, and being able to judge as to their own interests, acquiesced so far in the management of Mr. Cameron under these conditions that it would be inequitable for them to fall back on the directors and say: "You shall make good all calls on that stock, because it has turned out that your plan has failed; and after two years, although we knew the facts at first, we think now we should have stopped the matter at the outset." It seems to me that those parties who, knowing the facts, ratified what was done, cannot take advantage of the directors and make the directors liable to answer any of these calls. But so far as shareholders who were innocent of all knowledge are concerned, shareholders who did not ratify or acquiesce, or who were ignorant of this, they are not precluded now before the liquidator from calling upon the directors who are the defendants here to contribute to the amount of the calls which they would be required to pay in winding up this company. I do not see that I can make any other declaration than that; and it is subject to my further consideration in case I should come to the conclusion, as Mr. Moss and Mr. Mackelcan have argued, that the simple objection is enough to entitle all those who were at the meeting, and all the plaintiffs, to participate in the benefits—to require the defendants to answer the calls. If that position is maintainable, of course the plaintiffs would be entitled to the relief they seek, and the costs of the suit. My present opinion is, that their own ratification or acquiescence would be sufficient to prevent them from succeeding. I will consider that last point. At present I think Mr. Petrie knew what was done, and was content to let it remain; but the principle I have enunciated applies to him.

and it was only when the shoe pinched from loss that they complained.] They could not help that, they could not stop the business of the company, and had to take the chance of prosperity, and if it had succeeded there might have been no loss, and then the plaintiffs could not have complained of the transfer. No right of action arises until the injury actually occurs: *Backhouse v. Bonomie*, 9 H. L. C. 503. Lord Justice Thesiger, says: "If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing on that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of that act": *De Bussche v. Alt*, 8 Ch. D. 286, p. 314. That was not the case here. The plaintiffs had no objection to Cameron as manager, and if they had, they could not have prevented his appointment, but they have a right to complain of his getting such a large amount of the directors' stock while they of course approved of the company doing well so as to improve the stock which they held and could not get rid of. [PROUDFOOT, J.—At the annual meeting Cameron's holding the stock was discussed, and although some approved of it and some did not, still no action was taken about it.] Nothing was said about it in the report before the meeting, and all that was said was subsequent to the report being adopted, and then all that those dissenting could do was to talk, for the others had the voting power, and those talking were overpowered. [BOYD, C.—But Dr. Husband's evidence shews it was discussed at the general meeting]. It may have been discussed, but no formal vote was taken on it. The director's report says nothing of Mr. Waldie's report or his actual reasons for resigning, but on the contrary, said he was resigning for private reasons. That is the way information was withheld from the shareholders, and they could not acquiesce without knowledge. [PROUDFOOT, J.—But does Mr. Waldie's report contain any fact suppressed? Was it not

more an opinion as to how the business should be carried on?] He recommended a five per cent. call. [PROUDFOOT, J.—Still is that more than an opinion?] The fact was, their capital was gone, and they were carrying about \$10,000,000 of risks. [PROUDFOOT, J.—If there had been two or three years of prosperity, and then bad times had come, could these plaintiffs still repudiate the transfer if they had protested against it when it was done?] Yes, the directors could not release themselves unless they got a release or an actual consent to the matter: *Ex parte Adamson*, 8 Ch. D. 817; *In re European Central R. W. Co.—Gustard's Case*, L. R. 8 Eq. 443; *Carr v. London and North-Western R. W. Co.*, L. R. 10 C. P. 307 at 316, 317; *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188 at 206, where Brett, L. J., says: "I am speaking now of the estoppels which arise in business or in daily life, and, as it seems to me, these estoppels have no effect on the reality of the transaction." Here the reality of the transaction is, the breach of trust. In the case of *Pepperell v. Chamberlain*, 27 W. R. 410, the plaintiff objected, but the defendants said they did not care for his objections: Per *Fry, J.* at p. 411. Here the shareholders protested all they could: *Knox v. Gye*, L. R. 5 H. L. 674; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630. Nothing that the plaintiffs did can be construed into a confirmation, they dissented, protested, and grumbled all the time. The question is, should shareholders, who had knowledge of the wrongful act, but pointed it out to the wrongdoers and objected to it, be put in the same category as those who did not dissent. The latter, of course, cannot afterwards complain. The rule is, if a person stands by while an act is being done, and certain changes in interest take place, he cannot afterwards complain. But if it is pointed out, the person cannot be said to do the act upon the faith of the silence of the party standing by. After objecting, it is open to the objecting party to confirm it if he chooses; but no one can say that the plaintiffs here confirmed the act or waived their right to object. [FERGUSON, J.—I suppose acquiescence is estoppel by conduct.]

Certainly. The knowledge must be followed by assent. If he dissents when he gets the knowledge the cause of action is just as much vested in him as it was before, and unless he assents, it can only be divested by the Statute of Limitations. The insolvency and troubles of the company were not attributed to the appointment of Cameron or his management. Mere silence or delay is not sufficient, there must be something active to constitute acquiescence, and something very active after dissent expressed: *Evans v. Smallcombe*, L. R. 3 H. L. 249, at 256, 257; *Spackman v. Evans*, L. R. 3 H. L. 171; *Murray v. Palmer*, 2 Sch. & Lef. 474; *In re Cross, Harston v. Dennis*, 20 Ch. D. 109; *In re Alexandra Palace Co.*, 21 Ch. D. 163; *In re Exchange Banking Co., Flitcroft's Case*, 21 Ch. D. 519; *Thompson v. Eastwood*, 2 App. Cas. 215; *Hanchett v. Briscoe*, 22 Beav. 504, 505; *Farrant v. Blanchford*, 1 DeG. J. & S. 107, at 119; *Lewin on Trusts*, 7th ed. 744, *London, Financial Association v. Kell*, 26 Ch. D. 107; *In re Scottish Petroleum Co.*, 23 Ch. D. 413; *In re London and Staffordshire Fire Ins. Co.*, 24 Ch. D. 149; *Bigelow*, on Estoppel, 3rd ed. 568; *Whitchote v. Lawrence*, 3 Ves. 752; *Kidney v. Coursmaker*, 12 Ves. 136, 158.

McCarthy, Q. C., and *Nesbitt*, for the defendants. The action is not properly constituted. Each one of the plaintiff's cases may be different as to the circumstances, as the judgment of the learned Chancellor shews. The damage may be different in each case. [PROUDFOOT, J.—But all their rights of action arose from the one act of transfer.] Yes, but the plaintiff's rights have nothing in common, and the defendants may have different defences to each plaintiff. The defendants also had different interests. All of them did not vote for the transfer. Three of them were not present and one declined to vote. If there was a breach of trust and the transfer is held good, how could these four be held liable? Even those present who voted for the transfer were acquitted of any fraud by the judgment of the Chancellor. There was nothing to shew that Cameron was a man of straw: on the contrary, the evidence

shews that he was a wholesale merchant, and was considered to be a man of means, one witness fixing the amount of same at \$40,000. The fact of his becoming manager, with a large interest in the company would strengthen it, and insure his best exertions. The right of a director to transfer his shares is absolute, he is not a trustee of those shares for the shareholders: *In re National Provincial Marine Ins. Co.—Gilbert's Case*, L. R. 5 Ch. 559; *Bush's Case*, L. R. 6 Ch. 246. [PROUDFOOT, J.—Is that the case that went to the House of Lords under the name of *Murray v. Bush*?] Yes, see p. 258, 262. [*Moss, Q. C.*—In *Bush's Case*, the director only consented to a transfer to himself, not from himself.] The evidence shews that Cameron wanted to get enough stock to control the company, and made that a condition of taking the management, but the directors, while they wished to get him as manager, and thought he would do well for the company, refused to give him a controlling interest, but still gave him a large interest. Shareholders have a right to transfer to a man of straw even to get rid of a liability if the transfer is actually made: and directors have the same right if they do not part with their qualification. Sec. 6 of 39 Vic., c. 51 (set out in judgment of FERGUSON, J.), which incorporates the company is the section in question. What is a breach of trust? If the trustee does something that the trust deed says he shall not do; or if he goes out of the ordinary course of business even, it may be an implied breach of trust. If he has a discretion and honestly exercises it, no matter what the result is, that is not a breach of trust. If these directors honestly thought that this transfer was for the benefit of the company, the result has nothing whatever to do with it: *Costabadie v. Costabadie*, 6 Ha. 410; *Gisborne v. Gisborne*, L. R. 2 App. Cas. 300; *Tabor v. Brooks*, 10 Ch. D. 273; *Brophy v. Bellamy*, L. R. 8 Ch. 798. As to the duties of directors see *Spackman v. Evans*, L. R. 3 H. L. 171: *In re London and County Assurance Co.—Jessop's Case*, 2 DeG. & J. 638; *In re Smith, Knight & Co.—Weston's Case*, L. R. 6 Eq. 242;

S. C., L. R. 4 Ch. 20. Outside of the findings of the learned Chancellor, and fortified by his finding that there was no fraud, the directors had the right to make the transfer, as their discretion was honestly and in good faith exercised. On the question of the responsibility of trustees see *In re Speight*—*Speight v. Gaunt*, 22 Ch. D. 727; *In re Godfrey*—*Godfrey v. Faulkner*, 23 Ch. D. 483. As to Courts not interfering with trustees in the exercise of their discretion: *Taft v. Harrison*, 10 Ha. 489. See also *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450; *Smith v. Anderson*, 15 Ch. 247; *London Financial Association v. Kell*, 26 Ch. D. at p. 144; *Imperial Hydropathic Hotel Co.—Blackpool v. Hampson*, 23 Ch. D. 1 at p. 12; *Land Credit Co. of Ireland v. Lord Fermoy*, L. R. 5 Ch. 763. Now as to the question of acquiescence. If the cause of action vested on the 22nd of January, 1880, and they could have sued then, what was their damage? It was the depreciation of their stock by the appointment of Cameron, and the transfer of the director's stock; but if these acts improved the position of the company, there was no damage, and the evidence shows that the effect on the public mind was good. (FERGUSON, J.—But Mr. Mackelcan agrees that the damage did not arise until afterwards.) When were they to claim then; seven years might have been good, and then seven bad. The loss which the trustee was bound to make good, was the loss that directly flowed from the breach of trust, if any, at the time it took place: *Murray v. Bush*, L. R., 6 H. L. 37, at p. 59. In that case the company should have been wound up when they conceived the scheme. Here the company was not illegally carried on: See also *Evans v. Smallcombe*, L. R., 3 H. L. 249; *Houldsworth v. Evans*, L. R. 3 H. L. 263. The relief prayed in this action is not the relief which the facts would entitle the plaintiffs to when fraud is negatived. Acquiescence is not in terms, but in the act of assent: *Spackman v. Evans*, L. R. 3 H. L. 233. Unless there was a scheme no case can be made against the directors. Directors have the same rights

as to transfer that shareholders have: *In re National Provincial Marine Ins. Co.—Gilbert's Case*, L. R. 5 Ch. 559; *Galloway v. The Mayor, &c., of London*, 2 DeG. J. & S. 638; *Penny v. Francis*, 30 L. T. 185; *In re Bank of Hindustan, &c., Ex parte Kintry*, L. R. 5 Ch. 95; *In re National, &c., Ins. Co., Ex parte Parker*, L. R. 2 Ch. 685; *In re The Mexican, &c., Co.—Hyam's Case*, 1 DeG. F. & J. 75; *Costello's Case*, 2 DeG. F. & J. 302; *Re Edward Shelly*, 4 DeG. J. & S. 543. Some of these cases shew that a shareholder can go into the market and pay a man to take his place if the transfer is made, and there is no fraud. The judgment should be reversed, and action dismissed, and in any event the action should be dismissed as against the four defendants who did not concur in the transfer. If the Court should hold that there was a breach of trust, then the plaintiff's claim is the fall of the stock at the time of the transfer.

Mackelcan, Q. C., in reply. There are certain things the directors have the right to do, and the shareholders cannot interfere, such as the appointment of Cameron, but they have the right to object to the transfer. The plaintiffs were willing to take their chances of success with the directors; but they object to taking the chances and allowing the directors to throw their chances on the plaintiffs' shoulders: *Harris v. Truman*, 8 Q. B. D. 268, cited in *Culhane v. Stewart*, 6 O. R. 98; *Life Association of Scotland v. Siddal*, 3 DeG. F. & J. 58. The evidence shews that at the time of the transfer the condition of the company was really worse than nothing, except for the liability of the shareholders on their unpaid stock, and that the statement to the contrary submitted was cooked up. The directors had no absolute discretion in the matter of the transfer, they had a duty to perform to protect the body of the shareholders. In the cases referred to by my learned friend Mr. McCarthy, there was an absolute uncontrolled discretion and irresponsible authority. In *Re Smith Knight & Co.—Weston's Case*, L. R. 6 Eq. 238, and 4 Ch. 20, the power to refuse to consent was expressly

limited to certain cases within which the one in dispute did not come. In this case the directors were warned before they consented to the transfer, and they were consequently put upon their guard, and upon enquiry. Some cases go so far as to hold that trustees are not protected even by the opinion of counsel if the act turns out wrong. The judgment of the Chancellor finds that their interest and their duty conflicted, and that when they divested themselves of their stock, they got rid of a liability. The defendants say that they did not know what Cameron's standing was, but they should have known, and would if they had enquired. They cannot, under the circumstances, come here and say they acted for the best. The evidence shows that Mr. Buchan, a director, was about to transfer his stock, but so soon as he saw how unfair it would be to the other shareholders, he declined to do it, and remained liable for a large amount: *Beatty v. North West Transportation Co.*, 6 O. R. 300 (a), shows what the position of directors is as trustees. [PROUDFOOT, J.—But each case depends on its own circumstances.] Certainly, but we must start with the principle that all directors are trustees, and must be treated as such: *Thompson's Liability of Officers and Agents of Companies*, 351. A cause of action may accrue at a certain date, but the party injured may wait until he is damnified before he commences proceedings, and the Statute of Limitations will not run against him until the damage arises. If a trustee makes an improper investment, and it turns out bad and a loss happens, no action need be commenced until after the loss has happened. In *Clegg v. Edmondson*, 8 DeG. M. & G. 787, it was a hazardous business, and the plaintiff took no share of the liabilities for nine years, and gave no assistance to the business; but just waited for a chance of profit. Here the defendants have remained liable on their stock all the time. In *Clarke v. Hart*, 6 H. L. C. 656, the principle is pointed out that the party has abandoned his right.

(a) Since reversed in the Court of Appeal.

Nesbitt, in reply. The time of bringing the action is the test of its character: if at the time of the transfer, then the damage is what was then sustained. No damage flowed from the transfer: it was from carrying on the business. This is not a case in which the directors, if trustees, made a bargain with, or a profit out of their *cestuis que trustent* (a).

May 21, 1885, PROUDFOOT, J.—The judgment in this case declared that the several transfers to Charles Cameron by the directors of the insurance company, who are defendants, were, and each of them was, a breach of trust on the part of the defendants, and ordered that the several defendants do pay and make good to each of the plaintiffs, who were innocent of all knowledge of the said breach of trust, or who have not ratified or acquiesced in it, or who were ignorant of it, the amount of the loss occasioned to him or her respectively by the non-payment of the calls made upon the transferred stock.

The plaintiffs appeal from this judgment because there should have been no qualification of the right of the plaintiffs by rendering it liable to be affected by their knowledge of or acquiescence in the breach of trust, as under the circumstances of this case, the plaintiffs having objected to the transfer before it was effected, knowledge or acquiescence would not bar their right.

The defendants by their cross-appeal object to the finding that the transfer was a breach of trust, and to the relief given consequent thereon.

It will be convenient to dispose of the defendant's appeal first.

The company began business in 1875 with a subscribed capital of \$1,000,000, of which ten per cent. was paid. In 1877 the disastrous fire at St. John in New Brunswick took place, where the company had a number of risks and

(a) The CHANCELLOR presided during the early part of the first day, but was not present during the remainder of the argument.—*REP.*

incurred large losses, which considerably reduced the capital of the company. But the company carried on business, and were receiving large sums in premiums. The balance sheets of the company in December, 1877, shewed a surplus of \$27,128, and in December, 1878, a surplus of \$54,500, and in December, 1879, this was reduced to \$28,000. But in 1879 the company had received in premiums \$179,654. In December, 1880, the surplus was stated to be \$53,392, and in 1880 the premiums received amounted to \$225,611. Their losses were heavy, certainly, but the company was not insolvent.

Having had to get rid of a former manager, they appointed Mr. Waldie to that position in October, 1879. On the 20th November, 1879, Waldie made a report to the company and declined to remain manager. This report was much commented on during the argument. In it Waldie says he had spent ten days in informing himself as to the character of the business. His first perplexity arose with regard to the extended field over which the risks were scattered and the character of them. And he found out that his knowledge of the details and technicalities of an insurance office was very limited. His second anxiety was that the losses were keeping pace with the income, and just then exceeding it. This, with a feeling of his own deficiencies led him to inform the committee that he did not feel able for the work, and that he would gladly decline to enter upon the duty of manager.

He then gave his views with regard to the company, under three possible modes of conducting its affairs.

The first was to prosecute the business thoroughly, and not take bad risks. To do this successfully and secure equal terms with the best companies it would be necessary to call up more capital and increase the staff. This plan was based on more prosperous times.

The second was to make it an Ontario local company, with a possible reduction of gross income. To do this, and to meet losses likely to occur on the volume and character of risks then on the books, would require a call

or that an overdrawn bank account be arranged for, up to \$50,000 or \$60,000. He thought the better plan would be to make the call and control it, than to have it forced on the company.

The third plan proposed was to go on as at present, and trust to luck and better times. This he disapproved of. Waldie's resignation was accepted.

Cameron, who had subscribed for stock to the amount of \$75,000 and had been a director from the beginning, was appointed manager. His salary was fixed at \$2,500 per annum, and he was to receive a bonus of five per cent. on the net profits of the company, for each year after the deduction of all expenses and the setting aside of an additional sum of \$8,000 in lieu of a dividend.

Application was made to the executive committee at its first meeting in January, 1880, on behalf of a large number of shareholders for permission to transfer to Cameron the amount of stock mentioned, which included the stock of the defendants afterwards transferred. The committee permitted the transfers, subject to the approval of the board.

The report of the executive committee was made on the 22nd of January, 1880, and was presented to the board of directors the same day when eighteen directors were present, when a resolution was passed in the following terms: "That this meeting having heard the explanation as to the transfer of stock to Mr. Charles Cameron, referred to in the report of the executive committee, and feeling that the consent to such transfer is in the best interests of the company, and there appearing that there is a sufficient re-insurance fund to meet all liabilities upon existing policies. Resolved, that the consent of the board is hereby given to the transfer of the stock in the report to Mr. Cameron."

The resolution was carried by a vote of eleven to six, one not voting.

Cameron was on the executive committee and of course knew of Waldie's desire to resign from the report of the

20th November, and he then appears to have contemplated applying to be made manager. And as Waldie had been engaged for three years at a salary for the first of \$2,000, the second, \$2,500, and the third, \$3,000, together with five per cent. on the net profits, it was an object to become the holder of as much stock as possible. Cameron agreed for a fixed salary of \$2,500, and for five per cent. on the profits, and made application to the defendants who afterwards transferred to him to sell a portion of their stock to him. He bought in this way all that was transferred to him at twenty cents in the dollar, and with his original subscription and other purchases he became the owner of \$435,000 of stock. The defendants retained in their own hands \$82,000. The plaintiffs held \$132,800. The amount transferred by the directors to Cameron was \$295,000.

For the purpose of making the report required by the statute and to make the matter look better to the public, Cameron re-transferred to the defendants their stock, or at least I think \$285,000, and after the report was made the directors conveyed it again to him.

A general meeting of the shareholders was held on the 11th February, 1880, when the report of the directors was presented. The report mentioned that Mr. Waldie, after occupying the position of manager for a short time, for private reasons expressed a desire to be released from his engagement, and his resignation was accepted. The report further mentions the appointment of Mr. Cameron.

At this meeting a number of those who voted against consenting to the transfer to Cameron, and several of the present plaintiffs were present.

The report spoke in encouraging terms of the business of the company, stated the gross premiums for 1878 and 1879, shewing an increase in the latter of \$41,236, and the annual statement showed a surplus of \$28,802.

The twenty-four directors elected at this meeting included a number of the present plaintiffs, Thompson,

Hurd, Coburn, Vernon, Bruce, and some of the witnesses examined on their behalf, Buchan and Husband.

The business was carried on for 1880 and 1881. I have mentioned that the premiums received in 1880 were \$225,611, and the surplus was \$53,392. In 1881 the premiums were \$259,534, and the surplus \$22,371, although there was a loss sustained of \$16,000 over the income of that year, at least, that is, the sum stated in the report of the executive committee of 29th December, 1881, for a period of eleven months.

The 39 Vic. ch. 51, sec. 6, (D.), the Act incorporating this company enacted that, "No transfer of any share of the stock of the said company shall be valid until entered in the books of the said company * * ; and until the whole of the capital stock of the said company is paid up, it shall be necessary to obtain the consent of the directors to such transfer being made * * ."

In the matter of dealing with his shares, a director is in general as free as any other shareholder. He is not a trustee for the general body of the shareholders, so as to be unable to deal with his shares in a manner prejudicial to the interests of his *cestuis que trustent*, but in a vast variety of circumstances is just as free to deal with his shares—except perhaps his qualification which he cannot deal with without giving up his directorship—as any other person: *In re National Provincial Marine Ins. Co.—Gilbert's Case*, L. R. 5. Ch. 559.

In this company the qualification of a director was to be the holder of 20 shares of \$100 each, or \$2,000; and all the defendants, with the exception of Cox, who only retained 20 shares, retained much more than enough to qualify them as directors, after making the transfers to Cameron. Six of them retained 50 shares each; three retained 100 shares each; one retained 58 shares; and one 150 shares.

But it was argued that the statute imposed a duty upon them in regard to the transfer of shares, that the power to

consent was a trust for the benefit of the shareholders, to see that the shares did not get into the hands of persons who were unable to pay the calls that might be made.

A careful perusal of the evidence satisfies me that the transfer to Cameron was not made with the view of *unloading* the stock held by the directors to get rid of the liability to pay calls on it. The report of Mr. Waldie no doubt led them to see that the business of the company required careful management to make it successful, and they decided upon carrying on the business and having it managed carefully. Cameron was one of the directors of the company from the commencement, and had taken much interest in its affairs. He was a good business man, and appeared to be well acquainted with the insurance business. He applied to become manager, naming a salary of \$2,500 per annum and five per cent. on the profits, after making allowance for dividends, as his terms, and also asking that stock enough should be transferred to him to give him a controlling interest in the company. He thought he was going to make it pay; that he could carry on the business satisfactorily. The directors refused to give him a controlling interest in the company, but agreed to his purchasing stock to a certain extent. In pursuance of this arrangement he bought stock from the defendants for twenty cents in the dollar of the amount paid up.

Some of the directors who are now plaintiffs objected to the transfer to Cameron, alleging him to be a man of straw. The defendants do not seem to have made any inquiry as to Cameron's means, relying upon his general reputation for being a man of means; and he was supposed by them to be worth from \$50,000 to \$60,000. It turned out that he was worth only about \$8,000. One at least of the directors, Mr. Osler, after transferring stock to Cameron, began to think he had been imprudent in parting with his stock, and gave directions to a broker to purchase any quantity he could get at the same price he had sold for, but was unable to get any.

Upon the same day that the transfer of the stock to Cameron was sanctioned a general meeting of the shareholders was held, and the directors made a report to the meeting, which did not mention Waldie's report, nor the transfer of the stock to Cameron. But this transfer was well known to the shareholders, and one or two persons spoke strongly against it. There was no motion made disapproving of it.

These circumstances all seem to me to indicate that the transfer to Cameron was to give him, not a controlling interest, but so substantial an interest in the future of the company, as to stimulate him to the greatest exertions on its behalf,—that the defendants thought that under his management and their control it could be made a prosperous and successful company—that there was not much likelihood of calls being made, and that, if made, Cameron could pay them. They refused to part with all their stock, and retained much more than was necessary to qualify them as directors, which is inconsistent with the notion of *unloading* merely for the purpose of *unloading*, as Cameron would have bought all if they would have sold. That Cameron himself believed in the good prospects of the company, notwithstanding Waldie's report is plain enough, as he was risking all he possessed in it.

The case of *Murray v. Bush*, L. R. 6 H. L. 37, contains very much that is applicable to the present.

In that case there was the report of an accountant showing that eighty per cent. of the capital had been lost which had the effect, under the deed of settlement, of dissolving the company. This report was not submitted to the shareholders. The accountant had not allowed anything for the good will, as in the present case, and hence it was held there was no evidence of the eighty per cent, having been lost. I adapt the language of Lord Cairns to the present case, p. 60. We do not sit as judges upon questions of morals or of manners. If we did, I would take leave to say that for my part I entirely disapprove of much that I observe in the conduct of the affairs of this

company by the directors. I disapprove of the want of frank communication to the shareholders by the directors, of the state of the company, and of the neglect of the observations, be they well or ill founded, which had been made in regard to the affairs of the company, by the person they consulted, namely, Mr. Waldie, and of the reconveyance of the stock to make a good appearance in the return to the government. But the question is this, were these things done by the directors for this fraudulent and evil end—to keep the company in the dark as to the state of its affairs until they, the directors, should have transferred, and in order that they might transfer their shares, and get rid of their own liability?

I do not think there was any such fraudulent design. Their case is much stronger than that of Mr. Bush, for he sold all his shares to Murray who absconded. Bush having, it is true, held them for a year after the unfavorable report.

Here the defendants did not attempt to get out of the company, they retained a considerable interest, and a considerable liability in it. The business was carried on for two years under the management of some of the plaintiffs as well as the defendants as directors, during which time they did a large and increasing business.

I do not think, under these circumstances, that it was incumbent on the company to make an investigation into the means of Cameron. He was a holder of \$75,000 worth of stock in the company, upon which he had paid all that had been called in. He was considered a desirable person to obtain as manager, and his terms had to be accepted or rejected—both he and the defendants had confidence in the success of the company—and upon this matter of the appointment of a manager the directors had power to make it. The appointment was made known at the general meeting, and the transfer of the directors' stock to him—vigorously protested against certainly by one or two shareholders, but not formulated into any resolution of disapproval.

I do not think, therefore, that the defendants committed any breach of the duty imposed upon them by the statute.

If it should be held otherwise, then I think the decree is right in directing an inquiry as to whether the plaintiffs have ratified or acquiesced in the breach of trust.

The observations of Thesiger, L. J., in *De Bussche v. Alt*, 8 Ch: D. 286, '314, as to the nature and effect of acquiescence scarcely apply to the present, and do not seem to be so absolute in their terms as referred to in argument. It was said that the plaintiffs having protested against the transfer to Cameron before it was made, could not acquiesce so as to bar them from bringing an action. That the right of action having once accrued it could only be barred by release under seal, or by accord and satisfaction, or by the Statute of Limitations. But Thesiger, L. J., p. 315, does not seem to deny that there might be such conduct constituting laches, or amounting to an estoppel so as entirely to preclude the enforcing a vested right of action.

And that is what I think was the case here. The plaintiffs in a directors' meeting protested against the transfer. They did not protest at the shareholders' meeting, so as to call for the opinion of the shareholders, on the transaction. They allowed themselves to be elected directors, and concurred in the management of the company for two years after. This is perhaps not properly acquiescence, but it is ratification, or amounts to an estoppel.

FERGUSON, J.—The material facts of the case are clearly, and I think sufficiently, stated in the judgment of Mr. Justice Proudfoot, and I do not consider it necessary to repeat them here. The Act incorporating the defendant company is 39 Vic., cap. 51 (D). By the 6th section of the Act it is provided as follows:

"No transfer of any share of the stock of the said company shall be valid until entered in the books of the said company according to such form as may, from time to time, be fixed by the by-laws; and until the whole capital stock of the said company is paid up it shall be necessary to obtain the consent of the directors to such transfer being made: Provided always, that no shareholders in-

debted to the company shall be permitted to make a transfer or receive a dividend until such a debt is paid or secured to the satisfaction of the directors; and no transfer of stock shall at any time be made until all calls thereon have been paid in."

The seventh section of the Act is as follows: "Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities of the company, but no further."

The eighth section provides, amongst other things, that the stock, property, affairs and concerns of the company should be managed and conducted by twenty-five directors who should hold office for the period of one year, &c.

The act done by the defendants directors of the company in consenting to the transfer of the stock to Mr. Cameron, which is the act complained of by the plaintiffs, was an act that was (in form at all events) within the powers given to them by the charter, and not such an act as was done by the directors in *Spackman v. Evans*, L. R. 3 H. L. 171, which seems to have been followed by such serious consequences.

During the argument much was said as to the position, powers, and duties of the directors of a company, and as to the extent of the trust reposed in them, their liability, &c., and many authorities that were referred to have a bearing on the subject. These authorities I have examined, but I cannot say with much practical advantage, for the purposes of this case. In the case *Imperial, &c., Hotel Co.—Blackpool v. Hampson*, 23 Ch. D. at pp. 12 and 13. Bowen, L. J., speaking of the directors of an English company, says: "These directors are not exactly agents nor exactly servants, perhaps not servants at all—nor exactly trustees, nor exactly managing partners, if by that is meant that they are nothing more and nothing less. They are persons invested with strictly defined powers of management under the articles of association of a statutory corporation."

The immediate question there was one of removal of directors, and, further on, the learned Judge said: "In order to consider what the powers of removal are on the part of such a corporation it stands to reason that one must look at the statutes and articles of association."

This statement of what is considered to be the proper office of directors does not, it is true, seem to throw any flood of light upon the subject, but it serves to check some of the statements to be found in the cases where it is said that directors are trustees, that they are the servants of the corporation, that they are managing partners, &c., and indicates (to me) that the defendants directors of the company stood, at the time of doing the act complained of, simply in the position of persons having powers and duties defined by the act of incorporation of the company.

It is to be borne in mind that in some of the cases in which it is said that directors are trustees, the provisions of the Act are referred to, as in *Re Exchange Banking Co. Flitcroft's Case*, 21 Ch. D. 525, where Bacon, V. C., said in the commencement of his judgment: "The case is, no doubt, one of great importance; it puts the 165th section on its trial; and it is necessary to consider with care what the meaning of the Legislature is, as appears in that section."

There does not appear to be any equivalent for this section in the Act of incorporation of this company.

That learned Judge was, however, of the opinion that the directors were trustees for the shareholders, but said that if he had any doubt it would be removed by reading that section.

The defendants, the directors, in the present case, were stockholders in the company to large amounts. It was not contended, and certainly it could not be successfully contended, that they had not the power under ordinary circumstances to consent to a transfer of their own stock, I do not see that any trust rested upon them in regard to their own stock. As to this stock I think they were simply stockholders. See *The National Provincial*

Marine Ins. Co.—Gilbert's Case, L. R. 5 Ch. 559. The Act done by them that is complained of, was as I have said, one that was in kind and form, within their powers under the Act of incorporation and it seems to me that the real question, at all events, the substantial question is, as to whether or not they acted honestly in doing the act.

In the case *Murray v. Bush*, L. R. 6 H. L. 37, the transfer there in question had been held to be invalid by the Master of the Rolls. That decision was reversed by the Lord Chancellor and his judgment was sustained in the House of Lords. At p. 60 of the report of the case Lord Cairns, after reflecting upon the conduct of the directors, says: "But the question, and, as it appears to me, the only question which your Lordships have to decide for the purposes of this appeal is this—were these things (treat them as censurable as you please) done by the directors for this fraudulent and evil end—to keep the company in the dark as to the state of its affairs until they, the directors, should have transferred, and in order that they, the directors, might transfer their shares, and get rid of their own liability? Unless the case can be brought up to that which I have stated, all the other observations with regard to the conduct of the directors appear to be, for the purpose of this litigation, wholly immaterial." The question in that case was, whether the respondent Bush was liable to be placed upon the list of contributories in respect of shares that he had held in the company after the sale and transfer of them to the purchaser Morrison; Bush having been at the time of the sale and transfer a director, and may not be considered identical with the question here, but I think the principle enunciated is applicable.

The learned Judge before whom this action was tried acquitted the defendants directors of the company of fraud in the opprobrious sense of the term, and expresses the opinion that they were acting with a view to the interests of the company in what they did, and that it was impossible to look at the evidence and fail to see that that

was what influenced them to a certain extent. But he thought they failed to regard all the matters that should have entered into their consideration.

After a perusal of the evidence I am of the opinion that it does not shew that these defendants directors of the company were, in doing the act that is complained of, guilty of any fraud towards the shareholders. On the contrary, I think a fair and reasonable finding upon the evidence taken altogether would be that what these directors did in appointing Cameron manager of the company, and assenting to the transfer of the stock to him was honestly done; and I think that when all the circumstances appearing are taken into account and fairly weighed, it cannot be reasonably said to be shewn by the evidence that these acts, or this act, (for the two seem to be combined so as to constitute, in a sense, but one act,) were not then apparently for the interests of the company, these defendant directors believing at the time that the company would continue to do business and prosper under the management of Cameron.

Assuming then that this is the effect of the sum of the evidence, I fail to perceive how, where the act of which the plaintiffs complain was not dishonestly done, and was an act within the scope of the prescribed powers and duties of the directors, and not in contravention, violation, or excess of any of these powers or duties but in accordance with one of them, it can be said that a breach of trust was committed. I am of the opinion that neither fraud nor a breach of trust has been proved against these defendants, and that the plaintiffs' case fails. I think the appeal should be dismissed, with costs, and the cross-appeal allowed, with costs. As a result, I suppose the action should be dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

WICHER V. DARLING.

Contract—Covenant in restraint of trade—Inadequacy of consideration—Invalidity—Policy of the law.

D. on entering the employment of W. as agent in the vending of teas and coffees, covenanted with W. not to engage in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as agent for any other person for at least two years after leaving W.'s employ. W. now moving for an injunction to restrain D., who had left her employ, from violating the above covenant.

Held, that the covenant was binding upon D., notwithstanding that the consideration for it might have been inadequate.

Held, also, that the above covenant was not invalid on grounds of public policy.

A covenant in restraint of trade is not invalid unless the restraint is larger and wider than the protection of the covenantee can possibly require.

THIS was a motion to continue to the hearing an interim injunction heretofore granted, prohibiting the defendant from selling or delivering teas or coffees in the city of Toronto.

The facts of the case are sufficiently stated in the judgment.

The motion was made on January 15th, 1885, before Rose, J.

Hall, for the motion.

Henderson, contra.

The following cases were cited: *Leather Cloth Co. v. Lonsont*, 9 Eq. 345; *Toronto Dairy Co. v. Gowans*, 26 Gr. 290; *Jones v. Heavens*, 4 Ch. D. 636; *Rousillon v. Rousillon*, 14 Ch. D. 351; *Hitchcock v. Coker*, 6 A. & E. 438.

January 20th, 1885. ROSE, J.—This is a motion to continue an interim injunction to the hearing. The order asked for is to prohibit the defendant from engaging "in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as agent for any other person or

persons for at least two years after" leaving the plaintiff's employment, he having at the time of entering into such employment made an agreement with the plaintiff which is in writing and under seal, and contains a covenant on his part not to so engage in such sale or delivery, the wording of the covenant being as above set out.

The plaintiff is a dealer in teas and coffees, selling and delivering the same in Toronto and its vicinity through agents who travel on specified routes, taking orders and filling the same. The customers thus do not of necessity or ordinarily go to the plaintiff's place of business. The success of an agent and the amount of business he will do, of course depends largely upon his ability to ingratiate himself with the customers. It follows that after being a length of time on his route, he might change his employment or enter into business on his own account without much loss of custom.

When first placed upon a route it is evident a man must work at some disadvantage, and his employer would not find him as profitable as after he had become well known.

The risk while he is learning his route is therefore largely his employer's, who also risks the loss of custom when he leaves his service. Against the latter risk the plaintiff has endeavoured to protect himself by obtaining the covenant in question.

By the terms of the agreement the service was to continue so long as it should be "mutually agreeable." It did not prove agreeable to the defendant, and after some months of service he left the plaintiff's employment.

It is not denied that he has violated his covenant; but it is contended that he is not bound by its terms for two reasons:

1. The consideration was inadequate, as the plaintiff could have dismissed the defendant from his service at any time.
2. The agreement was invalid, being in restraint of trade and unreasonable.

The first ground is clearly untenable. In *Rousillon v. Rousillon*, 14 Ch. D. at p. 359, counsel abandoned a precisely similar ground of objection in these words: "It might be contended that the consideration is inadequate, and that the cases as to guarantees, such as *Morrell v. Cowan*, 6 Ch. D. 166, 7 Ch. D. 151, do not apply: but *Gravelly v. Barnard*, 18 Eq. 518, is against that contention, and we do not propose to raise it now."

Fry, J., in giving judgment, said: "It has been suggested that there is no sufficient consideration shewn; but, as Mr. North has declined, in the state of the authorities, to argue that point before me, it does not require adjudication at my hands."

I am of opinion that the second ground is equally untenable. The duty is not cast upon me of determining whether the defendant, when he entered into the contract, was acting prudently, and if I should be of the opinion, with the light of the subsequent events, that he had made a bargain which bore hardly upon him, then to release him from such bargain. No fraud on the plaintiff's behalf is suggested in making the bargain; no relief is, or, on the facts here presented, could be asked on that ground. The defendant, it was admitted, was a man possessed of ordinary intelligence, and with his eyes open he made a contract which he then thought it was his interest to make.

On grounds of public policy I could not interfere, and declare the contract unreasonable unless the restraint is larger and wider than the protection of the plaintiff *can possibly require*.

This is the rule laid down by Lord Wensleydale in *Ward v. Byrne*, 5 M. & W. 548-561, and adopted by the Court of Exchequer Chamber, 6 A. & E. 454, on appeal from the Queen's Bench in *Hitchcock v. Cotter*, 6 A. & E. 438, and followed in *Rousillon v. Rousillon*, 14 Ch. D., 351.

For the reasons I have above briefly indicated, it is impossible for me to say that the protection is larger and wider than the plaintiff can possibly require, and I cannot therefore interfere to relieve the defendant from the contract he willingly entered into.

I have the less regret in arriving at this conclusion when I consider the apparently gross impropriety of the defendant's conduct since he left the plaintiff's employ in having printed "gift tickets" and "delivery tickets" similar in shape, colour, size, and general appearance to those used by the plaintiff, and using these tickets in the prosecution of his endeavours on his own behalf to take orders for teas and coffees from, it is alleged, customers of the plaintiff.

I think the injunction should be continued to the hearing in the words of the covenant.

Mr. Hall proposed to have the injunction made perpetual, as the plaintiff was not asking damages in this action. If assented to such an order may go. In that case the plaintiff will be entitled to her costs, if she asks them.

A. H. F. L.

[CHANCERY DIVISION.]

WHITING ET AL. V. HOVEY ET AL.

Chattel Mortgage Act—Sufficiency of description of goods—Necessity for change of possession—R. S. O. ch. 119, sec. 23—Interpleader.

The president and secretary of an incorporated company, which was insolvent, executed an assignment to trustees for creditors of all the real estate of the company, and also of "All and singular the personal estate and effects, stock in trade, goods, chattels, rights, and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever, and whether upon the premises where the company's business is now carried on or elsewhere, which the company is possessed of or entitled to in any way whatsoever."

Held, that the description of the goods was not sufficient within the meaning of R. S. O. ch. 119, sec. 23, and that therefore and inasmuch as the evidence showed that there was no immediate delivery of the goods to the trustees, followed by an actual and continued change of possession of them, the assignment of them was invalid.

Carscallen v. Moodie, 15 U. C. R. 92, and *Nolan v. Donnelly*, 4 O. R. 440, considered and followed.

THIS was an interpleader issue arising out of adverse claims to certain goods, made under circumstances which are fully set out in the judgment.

The issue was tried on December 5th, 1884, before Ferguson, J., at Toronto.

McMichael, Q.C., for the plaintiffs. The plaintiffs were in possession, and that is their case at present.

B. B. Osler, Q. C., and *Hall*, for the defendants. No authority in the directors to execute this assignment, which is of all the property of the company has been shown: *Donley v. Holmwood*, 30 C. P. 240, 4 A. R. 555; *Quebec Agricultural Implements Co. v. Hebert*, 1 Quebec L. R. 363; *Stephen's Joint Stock Companies*, p. 391-394; *ib.* 370: *Thring on Joint Stock Companies*, 4th ed., p. 79, *n. e.* Moreover the assignment is void under the Chattel Mortgage Act, because the goods are not sufficiently described: *Nolan v. Donnelly*, 4 O. R. 440. But, besides this, there was no delivery of possession, and no intention to deliver possession: R. S. O. ch. 19, sec. 1; *Carruthers v. Reynolds*, 12 C. P. 596; *Doyle v. Lasher*, 16 C. P. 263; *McLeod v. Hamilton*, 15 U. C. R. 111; *Wilson v. Kerr*, 17 U. C. R. 168; *Barron on Bills of Sale*, p. 122; *McMartin v. Moore*, 27 C. P. 401; *Ontario Bank v. Wilcox*, 43 U. C. R. at p. 488; *McMaster v. Garland*, 31 C. P. 320; *Barker v. Leeson*, 1 O. R. 114; *Frazer v. Lazier*, 9 U. C. R. 679; *Scribner v. McLaren*, 2 O. R. 265; *Mason v. Macdonald*, 25 C. P. 435; *Hall v. Carmichael*, 2 A. R. 639.

D. McMichael, Q.C., in reply. The goods were on the lands that were conveyed to the trustees, and the constructive possession of the lands was the possession of the goods. The intention was, to give possession of lands and goods. The deed was perfectly good at any rate between the parties to it. The assignees required no leave or license to go upon the premises; the assignor did require such license. No one else had any right to possession, and no one else had, in fact, possession except the trustees. They had the power of locking up the goods. In *Carscallen v. Moodie*, 15 U. C. R. 92, the assignor was in possession. Here there was a vacant possession, except so far as the trustees were in possession.

February 17th, 1885. FERGUSON, J.—This was the trial of an interpleader issue. The plaintiffs, who were the claimants, claim the goods, or proceeds thereof, under an assignment made by The Farm and Dairy Utensil Manufacturing Company (Limited) to them as trustees for the benefit of the creditors of the said company. The company was incorporated under the provisions of 40 Vic. ch. 43, D. The assignment bears date the fifteenth day of August, 1884.

The defendants' title is under or by virtue of writs of execution against the goods of the company and others duly placed in the hands of the proper sheriff to be executed. No question was raised as to the validity of these executions.

The assignment recites, that the company had been and still were carrying on business in the city of Brantford, and that, in the course of such business, they had contracted debts which they were unable to pay in full, and that in consequence they had agreed to assign all their estate, of whatever nature or kind to the plaintiffs upon the trusts, and to and for the intents and purposes in the assignment mentioned.

The document professedly grants, bargains, sells, assigns, transfers, conveys, and assures to the plaintiffs, their heirs, executors, administrators, and assigns forever, all the real estate, lands, tenements, and hereditaments of the company whatsoever and wheresoever of or to which they were, at the time of making the assignment, seised, or entitled, or of or to which they then had or might have had any estate, right, title, or interest of any kind or description, with the appurtenances, the particulars of which were set out in a schedule annexed to the assignment: and:—
“All and singular, the personal estate and effects, stock in trade, goods, chattels, rights, and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever, and whether upon the premises where the company's business is now carried on or elsewhere, which the company is possessed of or entitled to in any way whatsoever.”

The schedule referred to and annexed to the assignment is as follows :

“ All and singular those certain parcels or tracts of land and premises situate, lying, and being in the city of Brantford, in the county of Brant, being composed of town lots numbers fourteen, fifteen, and sixteen on the east side of Waterloo street, and lots numbers two and three on the north side of Duke street running half way through to Wadsworth street in the city of Brantford, with the appurtenances to the said lands belonging or in any wise appertaining and used or enjoyed therewith, and the foundry, erections, and buildings thereon erected and being, including all articles such as engine, boiler, cupola, machinery and shaftings, in or upon said premises.”

The trusts on which the assignment was made, as stated in it, were to sell and dispose of the estate, and to pay or apply the proceeds, and of the collection of debts and accounts, in payment of the costs and charges and expenses of the assignment, and of the managing of the estate, and all costs, charges, and expenses incurred in respect thereof and the trusts therein contained ; and to pay and apply the balance in or towards the payment of the debts of the company in proportion to their respective amounts, without preference or priority.

The assignment was executed by the president and secretary of the company. It professed to have the corporate seal of the company attached to it. It was also executed by the plaintiffs and, as I understand, by one creditor, who was Mr. Wilson. Mr. Whiting, one of the plaintiffs, was the president of the company. The assignment was filed on the 16th of August, the day after the date of its execution.

On the part of the defendants in the issue it was contended, that the description of the goods in the assignment is not sufficient to satisfy the requirements of the Statute ; and counsel relied upon, amongst many other authorities, the case, *Nolan v. Donnelly*, 4 O. R. 440, submitting that that case is in point and binding upon me.

The description of the goods in that case was : " All the real estate, &c., and also all and singular the personal estate and effects, stock-in-trade, goods, chattels, rights, and credits, fixtures, book-debts, &c., and all other the personal estate and effects whatsoever or wheresoever, and whether upon the premises where the debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatsoever ; including, among other things, all the stock-in-trade, goods, and chattels, which they now have in their store and dwelling in the village of Renfrew aforesaid ; also, all and singular their personal estate and effects of every kind and nature."

The earlier part of this description, what is above and precedes the words " including among other things," seems to me the same substantially if not verbally as the description in the present case. The tendency of what follows would seem to be to make the general description better, rather than worse, as to the stock-in-trade, goods, and chattels in the store and dwelling in the village of Renfrew. The learned Chief Justice says, the question is, whether the locality of this stock-in-trade, &c., is sufficiently definite ; and in an elaborate judgment, in which the authorities are reviewed to a large extent, he arrives at the conclusion that the description is insufficient. From a perusal of the case I think it quite clear that had there been in that case no further description than there is in this case there would have been scarcely a question raised in the mind of the Court. I think counsel was right in saying that the case *Nolan v. Donnelly*, 4 O. R. 440, is in point and binding upon me here. I must therefor hold, I think, that the description of the goods is, in the present case, insufficient.

Counsel for the plaintiffs contended, that even if the description was insufficient yet the assignment was good, and should be sustained because it was accompanied by an immediate delivery of the goods and chattels assigned, and followed by an actual and continued change of possession of the same. It was argued that the

goods were on the lands that were conveyed by the assignment, and that the constructive possession of the lands was necessarily the possession of the goods, and further that there had been in fact an immediate delivery followed by an actual and continued change of possession of the goods.

As to the first of these arguments, a similar contention was made in *Carscallen v. Moodie*, 15 U. C. R. 92. At p. 100 the late Chief Justice Robinson is reported to have said: "But there was this to be considered, that although the assignees had taken a conveyance of the real estate, and had registered their deed, and although, as a general principle, the owner of real property is looked upon as being continually in possession so long as there is no one holding against him, yet this case has to be considered in connection with the statutes (the Chattel Mortgage Acts). I have thought a good deal of the matter since, and it appears to me that Carscallen having taken a conveyance of the building in which the chattels were, and the same instrument containing also an assignment of the chattels, he ought either to have gone into actual, visible possession of the building—that is, by himself, his tenants, servants, or agents—or at least Cudwell, who made the assignment, should have quitted the possession and gone out, for otherwise everything, so far as others could see, would continue just as it was, and that deceptive appearance would be held out to the world, which it was the intention of the Statute to prevent." Further on the learned Chief Justice, after pointing out how easily the law could in this way be evaded, says: "The doubt with me is, whether in such cases the Judge at *nisi prius* ought not to hold that that is not such 'an actual change of possession' as must accompany and follow an assignment in order to make it unnecessary to file the assignment, &c.; or whether it should in all cases be left as a question of fact for the jury, whether, looking at all the circumstances proved, there was not an actual change of possession." And further on he says: "It ought at least, I think, to have been

left to the jury to say whether there had been such an actual change of possession as the statutes require, and with a strong expression of opinion that the evidence showed that there had not been."

In that case Cudwell continued working in the factory up to the moment of the sheriff coming, and he remained there three weeks after the seizure. The learned Chief Justice remarks that there was no reason to suppose that he had any intention of quitting the possession when he made the assignment. The verdict, which was for Carscallen the plaintiff, was set aside and a new trial ordered.

It was contended that this case is different in this respect from *Carscallen v. Moodie*, 15 U. C. R. 92, because it was shown that the assignors did not continue in possession as in that case, but, on the contrary of this, the trustees went into and continued in possession. Upon the evidence I do not think that this is made out. On the 18th day of August, three days after the date of the assignment, a deed of composition and discharge was drawn up, according to the terms of which the company were to compound with their creditors and obtain a discharge from their liabilities. An effort was made to procure to this the signatures of all the creditors. It was signed by many of them, but some of the creditors refusing to sign it, the deed did not become operative. It is plain from the evidence that this deed was contemplated at the time the assignment was made. For a long time after the assignment there was no visible change in the possession of the property, and the correspondence seems to show that the business was conducted on behalf of the company, and not on behalf of or by the trustees. I think from the evidence that such was really the fact; and, I think, from all the evidence that the witness Hall, who had been manager of the company from the beginning, was not far mistaken in his understanding of the matter. In his evidence he says: "As I understand it, the property was to be considered to belong to the trustees to prevent any of the creditors getting a prefer-

ence until it was seen whether the composition deed would go through." He also says: "I understood that the estate had been assigned to the trustees; I was there not employed by the trustees. I remained there on the idea that the composition deed would be matured, and that the company would go on."

This witness says that the 15th of August was pay day: that he was at the court house till about one o'clock, when he left and did not return: that he went to get money from Alfred Watts to pay the men: that the meeting of directors had adjourned before he left the court house: that he received no instructions on that day and that he did not hear any given: that he did not see the trustees at all, at the factory or office, on the 16th of August (the 17th appears to have been Sunday): that on Monday morning (the 18th) the trustees were there, but they gave him no instructions whatever, and that he continued to do as he had done before: that he has no recollection of signing any paper for the trustees, and he thought he had no authority to sign for them. He says that the first change apparent in Whiting (who was president of the company and one of the trustees) was on the 28th of August, when he wanted the post office keys from Buchanan and the witness, and gave instructions at the post office to have all mails put into his box. He says that it was sometime in September or the latter part of August that it was concluded that the composition deed would not "go through," and that he heard Whiting say that he thought the assignment so good that it was not thought necessary to be particular about taking possession. He says that after the first week or ten days the trustees came there often. "After that I thought I was agent for them." The witness Buchanan was in the employment of the company as secretary. The letter impression book is put into his hands, and he says that the first time the word trustees is used is on the 23rd of August: that he gave up the keys of the post office to Whiting on the 28th of August. He says there were instructions to keep the concern running,

and that these were from the joint meeting of the directors and trustees. He says that on the 15th Champion (a) said to Hall and him (the witness) that he (the witness) should stay up there and keep the concern running until the deed of composition could be got signed, and that Champion said to him: "You know all about it, you had better go on." The witness Jones (b) states this somewhat differently, but I think the meaning is not far from being the same.

The trustees themselves in their evidence seem to endeavour to make out that they did take immediate possession, but I cannot think they succeed. Whiting says that it was expected that the company would succeed with the deed of composition, and that the property would be re-assigned, and that for a week or ten days after the assignment he expected this to come about, but his co-trustees did not; that they were not so sanguine: and he also said that he thought it was part of the duty of the trustees to get the composition deed executed by the creditors. He says that Hall and Buchanan were managing chiefly and they knew of the assignment, and that they went on as they did before: that he suggested a change in the heading of the bills, but he cannot say that he did this till sometime in the next week after the assignment, and he does not say just when he did it.

There was much evidence given for the purpose of showing that there had been an actual change of possession, and the contrary of this. It would be tedious further to refer to this here in detail. I think the proper conclusion upon the evidence is, that the company did not give up possession to the trustees upon the execution of the assignment, but that they, the company, continued in possession long after the assignment. I think the case, *Carscallen v. Moodie*, 15 U. C. R. 92, applies, meeting the argument based upon the conveyance of the lands. And I find that the assignment was not accompanied by an im-

(a) Champion was one of the trustees under the assignment.

(b) This witness was one of the directors of the company.

mediate delivery and followed by an actual and continued change of possession of the goods and chattels.

The issue may, I think, be disposed of on these grounds. The description of the goods and chattels contained in the assignment, being insufficient to fulfil the requirements of the statute, the assignment must be considered invalid, unless there was an immediate delivery of them to the assignees followed by an actual and continued change of the possession, and I have decided upon the evidence that there was not such delivery and change of possession.

A question was raised as to whether or not in any view of these matters the assignment could be upheld. The argument against its validity was, that inasmuch as the directors of the company were in no way authorized to make it, there being no by-law or any assent of the shareholders, or any authority from the shareholders at a meeting of shareholders or otherwise, the directors had no power to make an assignment of all the property of every kind of the company, and thereby inflict upon the company what has been called "political death;" but, deciding as I do on the other grounds against its validity, I need not, I think, determine this question.

I am of the opinion that the finding and judgment upon the issue should be in favour of the defendants, the execution creditors, and against the validity of the assignment to, and the alleged title of, the plaintiffs in the issue; and if it is necessary under the present practice to mention the matter of costs of the trial of an interpleader issue, I think the defendants should have their costs.

Finding and judgment for the defendants in the issue (the execution creditors), with costs.

A. H. F. L.

[CHANCERY DIVISION.]

FERRIS V. FERRIS ET AL.

Ante-nuptial settlement—Trusts—Executory and executed—Rule in Shelley's Case—Conveyance to husband and wife—Married Woman's Property Act, 1872—R. S. O. c. 125—R. S. O. c. 105, s. 11.

By ante-nuptial settlement, reciting that F. intended to make provision for his future wife, F. agreed with her and K. to transfer and convey to K. certain property he expected to acquire, to hold unto K. for the joint use and benefit of him, F., and his intended wife during their joint lives, and after the decease of either of them to the use of the survivor during his or her natural life, and after the decease of the survivor, to the use of the heirs of F. as he might by will direct: and it was further agreed that articles of settlement should be executed in pursuance of this document. After the marriage, F., pursuant to the said ante-nuptial settlement, conveyed in 1879, certain land to K. and his heirs, upon trust, with the consent of F. and his wife, or the survivor, to sell, lease, or otherwise convey the same, and to hold the moneys thereon arising upon the trusts and subject to the powers contained in the ante-nuptial settlement. F.'s wife having died, *Held*, that, though there were children of the marriage still surviving, F. was entitled to a conveyance of the lands from K. to himself in fee simple, for that the trusts of the ante-nuptial settlement were executed and not executory, and under them F. had an equitable estate in fee simple by virtue of the rule in *Shelley's Case*.

THIS was an action brought by Charles T. W. Ferris against Amelia Lemoine Ferris, Mary Graham Ferris, and George Dobbs Ferris, infants under the age of twenty-one years, and George Airey Kirkpatrick, for the purpose of having a certain settlement, of which the defendant Kirkpatrick was trustee, construed by the Court, and the respective rights of the plaintiff and defendants thereunder determined, and to have certain property conveyed to him by the defendant Kirkpatrick, and for further relief.

The infant defendants by their guardian *ad litem* delivered a statement of defence submitting their rights and interests to the protection of the Court, and the matter came up by way of motion for judgment on the 25th day of February, A. D. 1885.

The facts of the case sufficiently appear from the judgment.

Walkem, Q. C., for the plaintiff and for the trustee. The trusts of the settlement are clearly executed and not executory: *Lewin on Trusts*, 6th ed. p. 98. It was intended as a provision for the wife. It is similar to a jointure. The plaintiff clearly has a fee simple under the rule in *Shelley's Case*, and is entitled to the relief he claims: *Bowen v. Lewis*, 9 App. Cas. 890; *Hawkins on Wills*, pp. 184-5; *Jordan v. Adams*, 9 C. B. N. S. 483; *Doe d. Cole v. Goldsmith*, 7 Taunt. 208; *Trust and Loan Co. v. Fraser*, 18 Gr. 19.

J. MacLennan, Q. C., for the infant defendants. We contend that the infants have an interest and therefore the plaintiffs cannot succeed. It is true that the words, "as he shall appoint," do not take the limitations out of the rule in *Shelley's Case*: *Jesson v. Wright*, 3 Bli. 1. But the rule in *Shelley's Case* does not apply. Here the second remainder to the husband is a contingent remainder; it depends on his survivorship; and the particular freehold estate being contingent, the rule in *Shelley's Case* does not apply. Besides the words are used as well of personal property as of lands, and this shows a benefit was intended to the heirs; and the trusts being executory, the Court will mould them according to the intention of the parties: *Lord Glenorchy v. Bosville*, 1 Wh. & T., L. C., 5th ed. p. 1. Children are always within the purview of a marriage settlement. The rule is, that in a settlement the husband or wife shall not have control over the estate so as defeat the children. When there are articles, in drawing the deed pursuant thereto, the principles of equity must be adopted and regarded, and when this is not so, and so far as it is not so, the deed will be inoperative. I refer here to *Theobald on Wills*, 2nd ed. p. 557; *Jarman on Wills*, 4th ed. p. 285-7, p. 355-7; *Hadwen v. Hadwen*, 23 Bea. 551; *Grier v. Grier*, L. R. 5 H. L. 688. Moreover the husband and wife were tenants in common, because the wife took under the Married Woman's Property Act of 1872, the contract having been in 1876. In case of separation she could have claimed the benefit of one half of the estate. Thus we say

even if the rule in *Shelley's Case* does apply the plaintiff only gets a fee simple in half.

Walkem, Q. C., in reply. It is clear from the articles that the intention was to provide for the wife. The question is, what is the legal meaning of the document? There is no duty on the Court to interfere: *Lewin* on Trusts, 6th ed. p. 98. As to the particular estate being contingent this does not effect the rule in *Shelley's Case*. See *Jarman* on Wills, 5th Am. ed. vol. 3. p. 112; *Griffin v. Patterson*, 45 U. C. R. 536; *re Morse*, 8 P. R. 475; *Leitch v. McLellan*, 2 O. R. 587.

March 7th, 1885. FERGUSON, J.—The action is for the construction of a marriage settlement and the declaration of the respective rights of the parties thereunder, the plaintiff claiming that the property should now be conveyed to him by the trustee for the reason that he is the settlor, and that the trusts of the settlement have expired or come to an end. The case came on by way of motion for judgment. The plaintiff in his statement of claim says that on the eve of his marriage with Helen Jemima Dobbs, which took place on the 5th day of January, 1876, he executed a settlement which he sets forth. This bears date the 4th day of January, 1876, and is substantially as follows:

It recites that the marriage was about to be solemnized; that the plaintiff was desirous of making provision for a fit and proper settlement to and for the use and benefit of the party thereto of the second part (his then intended wife) and that he, the plaintiff, had reasonable grounds for expecting to receive certain property by will or otherwise from relations, and that he also intended to insure his life for the sum of two thousand dollars, and by it the plaintiff agrees with the other parties thereto (his intended wife and the trustee), that if the marriage should be solemnized he would forthwith insure his life for the benefit of the intended wife, and as soon as conveniently might be, assign, transfer, and set over unto the trustee by good

and sufficient transfers, assignments, and conveyances, all such property as he might receive as aforesaid, and the policy of insurance, to hold the same unto the trustee 'for the *joint use and benefit* of the plaintiff and his then intended wife during the term of their *joint lives*, and from and after the decease of either of them, then to the use of the survivor of them during the term of his or her natural life, and from and after the decease of the survivor then to the use of heirs of the plaintiff as he might by will direct." Then follows a covenant on the part of the plaintiff to pay the amount of the premiums and such other moneys as might be necessary in respect of the policy, and that in the event of his failing so to do the trustee might pay the same and recover the amount from the plaintiff. Then follows an agreement which I think is not of any materiality here, excepting the statement contained in it that articles of settlement were to be executed in pursuance of the document or settlement then signed and sealed by the plaintiff.

The plaintiff further states that the then intended marriage took place on the 5th of January, 1876, and that by indenture dated the 27th December, 1879, between him (the plaintiff) and the trustee, made in pursuance of the settlement, and intending to convey the lands mentioned in the same as properly coming within the scope of the settlement, the plaintiff granted a certain parcel of land being lot number one in the first concession of the township of Kingston, with the gore of land laying to the north thereof, to the trustee and his heirs, to the use of the trustee and his heirs upon trust with the consent of the plaintiff and his wife during their joint lives, and of the survivor of them during his or her life, and after the death of the survivor at the trustee's direction to sell, lease or otherwise convey the said lands (stating the manner in which these acts, or any of them, might be done by the trustee), and upon trust for the trustee to hold the moneys to arise from any such sale (after payment thereof of all expenses) and also the rents and profits of the premises, or

of the unsold parts thereof, upon such trusts, and subject to such powers as had been declared of the same respectively in the said agreement in writing bearing date the 4th day of January, 1876, and upon trust to hold the moneys to arise upon any mortgage if made by the trustee, to pay off and redeem any mortgage debt or encumbrance on the property, &c.

It is also stated that the plaintiff and his said wife used and occupied the premises until the death of the latter, which occurred on the 20th day of November, 1884.

The plaintiff then sets forth his contention, which is, that the settlement was intended as a provision for his wife only, and that, according to the true construction thereof and of the deed executed in pursuance of the same, he was entitled to an estate in fee simple in the lands under the rule in *Shelley's Case*, or by way of resulting trust, and that the trusts of the settlement are exhausted, and that he alone is now entitled to the lands, adding that he has required the trustee to convey the same to him, and that the trustee has suggested that the infant children are entitled to some interest in the lands by virtue of the limitations in the instruments and declines to convey the same to the plaintiff without the sanction of the Court, &c.

The infant defendants, the children of the marriage three in number, answer by the guardian in the usual way submitting their rights and interests to the protection of the Court

There was filed an affidavit of the plaintiff proving the execution of the two documents; that the deed was executed as it appears to have been in pursuance of the settlement, the marriage, the birth of the infant defendants, children of the marriage, and stating that as far as the deponent (the plaintiff) was concerned, the object of both instruments was to make provisions for his wife only, and that a provision for the children was not contemplated by him. The affidavit also states that the property conveyed is a farm of the value of about \$10,000.

There did not appear to be any dispute respecting the facts of the case.

For the defence it was, amongst other things, contended that the trusts in the settlement were executory and not executed trusts: that children are always within the purview of a marriage settlement: that when the trusts are executory the husband and wife are not permitted to have control over the property so as to defeat the children: that if the plaintiff should be permitted to succeed here the rights of the children would be defeated, and that in drawing a deed in cases where there is a settlement the principles of equity must be adopted and regarded, and where this is not done, and so far as it is not done, the deed will be inoperative.

In this case, so far as the trusts of the deed are concerned, they are stated by reference to those contained in the settlement. In respect to the trusts there appears to be nothing material contained in the deed that is not found in the settlement.

On the question as to whether the trusts of the settlement are executory or executed trusts I was referred to the leading case, *Lord Glenorchy v. Bosville*, 1 Wh. & T., L. C. 5th ed., p. 1, and the notes to that case which contain references to many cases on the subject. It is there laid down, and I apprehend correctly, that a trust is said to be executed where no act is necessary to be done to give effect to it, the limitation being originally complete, as, where the estate is conveyed or devised unto and to the use of A. and his heirs in trust for B. and the heirs of his body, and it is further stated that the mere direction to convey upon certain trusts will not render these trusts *executory* in the sense in which the word is used, if the author of the trust has, as it were, taken upon himself to be his own conveyancer, and instead of leaving anything to be done beyond the mere execution of a conveyance has defined what the trusts are to be in accurate and technical terms.

A reference is made at p. 19 to the language of Lord St. Leonards: "A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out from *general expressions* what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you and convert them into legal estates."

In the notes to the case, it is said that it is now clearly established, as laid down by Lord Talbot in the leading case, that a Court of Equity in cases of executed trusts will construe the limitations in the same manner as similar legal limitations. If my recollection is accurate this is a proposition that was not disputed on the argument, and I apprehend it is a proposition that cannot be successfully disputed. Now, when the general statements of the law that I have been referring to are applied to the trusts as they appear in the marriage articles (the settlement) in this case, it appears to me that the true conclusion is, that these trusts are executed and not executory trusts. They seem to me to be fully stated and declared, so plainly so that nothing is left but to draw a conveyance in accordance with them. I also think that the object of the settlement is also stated so that nothing is left to implication, but I do not know that it is material to discuss this part of the case, as I am of the opinion that the limitations on the face of the settlement must be construed in the same manner as similar legal limitations.

It was also contended on the part of the defence that there was not a sufficient freehold estate given to support the contention of the plaintiff in respect of the rule in *Shelley's Case*. What is said in this respect on the face of the settlement is: "To hold the same unto the said party of third part" (the trustee) "for the joint use and benefit of the parties of the first and second parts (the intended husband and wife) during the term of their joint lives." The

agreement is, that a conveyance shall, after the marriage, be made of the property to the trustee to be held by him upon this as parcel of the trusts. It was contended that as the transaction was after the passing of the Married Woman's Act of 1872 the effect of this would be to make the husband and wife tenants in common for life which would not support the plaintiff's contention respecting the application of the rule in *Shelley's Case* as to the whole estate, although it might do so as to an undivided moiety of it. I do not understand this contention. The words of the limitation to the husband and wife during their joint lives are certainly joint, "for their joint use and benefit during the term of their joint lives."

In the case *Re Shaver and Hart*, 31 U. C. R. 603, it was held that the effect of C. S. U. C. cap. 82, sec. 10 (a), was to create a tenancy in common only in cases where, before the 1st of July, 1834, there would have been a joint tenancy, and that a conveyance of land to a husband and wife in fee did not make them tenants in common, but that they held as before the statute by entireties, and in the judgment in that case the difference between holding by entireties and as joint tenants is clearly pointed out. The case is also referred to and followed in *Re Morse*, 8 P. R. 475. I was not referred to any authority showing that the Married Woman's Act of 1872 had the effect contended for by the defence. In *Fearne on Contingent Remainders*, 9th ed. (Butler), s. 31, it is, I think, clearly in effect stated that an estate to a husband and wife during their joint lives is a sufficient freehold estate to answer the requirement in this respect of the rule in *Shelley's Case*, and in this case I think the husband and wife had in equity such an estate. The words, "as he may by will direct," which follow the limitation to the heirs of the husband do not prevent the rule taking effect, as is shewn by the case *Jordan v. Adams*, 9 C. B. N. S. 483, referred to in *Hawkins on Wills* 184-5. See also *Jesson v. Wright*, 2 Bli. 1. On the whole case I am of the opinion that the trusts of the

settlement were executed trusts, and that the plaintiff has an estate in fee simple under the rule in *Shelley's Case*. This was subject to an intervening estate, which, according to the terms of the settlement, and as the facts have transpired, is also vested in the husband, the plaintiff. The plaintiff is, I think, entitled to a conveyance from the trustee, and I think he should pay the trustee's costs and the costs of the infant defendants.

Judgment accordingly.

A. H. F. L.

[COMMON PLEAS DIVISION.]

ROBINS V. COFFEE.

Replevin—Pleading.

In an action of replevin the first count charged the defendant with taking certain goods on premises known as the "Creemore Woolen Mills;" and in the second count with taking certain goods on the premises known as the "Northern and North-Western Station at the said village of Creemore." The defendant pleaded denying the taking and the property, and then for a third plea set up, that one W. was tenant to the defendant of certain premises in the said village known as "Block B," and certain other premises known as the "Langtry Block;" that rent was in arrear, and because of such arrears of rent the defendant "well avowed the taking of the said goods on the said premises and justly, &c., as a distress for said rent which still remains due and unpaid."

Held, on demurrer plea bad; for if the "said premises" upon which the alleged taking was made were the premises set out in the plea, then the taking was on other premises than those named in the declaration, and there was no confession; and the plea of not *cepit* covered this defence; but if the premises named in the declaration were referred to, then defendant confessed the taking and justified for rent due for other premises, which amounted to a taking off the demised premises, so that enough was not shewn.

ACTION of replevin.

In the first count, the plaintiff charged the defendant with taking certain goods on premises known as the "Creemore Woolen Mills;" and, in the second count, with taking certain goods on premises known as the "Northern and North-Western Railway Station at the said village of Creemore."

The defendant, for a first plea, denied the taking ; and, for a second, denied the property.

For a third plea, the defendant set up, that one Charles Woodhead was tenant to the defendant of certain premises in said village, known as "Block B," and certain other premises, known as a portion of the "Langtry Block :—" that rent was in arrear ; and because of such arrears of rent "well avows the taking of the said goods on the said premises, and justly, &c., as a distress for the said rent, which still remains due and unpaid."

To this the plaintiff demurred, on the ground that the said plea assumes to justify the taking of the plaintiff's goods as a distress for rent, but does not show that the premises in the said plea mentioned are the premises set out in the first and second counts of the plaintiff's declaration.

On May 19, 1885, the demurrer was argued.

D. E. Thomson, for the demurrer.

H. H. Strathy, contra.

May 20, 1885. ROSE, J.—I think the plea is bad. If the "said premises" refer to the premises set out in the plea, then the defendant avows a taking on premises other than those charged in the declaration, and there is no confession. The plea of *non cepit* already pleaded covered such ground of defence. If the words refer to the premises named in the declaration, then the defendant confesses taking them as charged, but justifies such taking as for rent due for other premises. In other words, he sets up a taking off the demised premises, in which case he has not shewn enough.

The form of plea in the 2nd ed. of *Bullen & Leake's* Prec. p. 618, will indicate the proper statement of a defence of taking goods fraudulently removed to avoid a distress, under 11 Geo. II. ch. 11, sec. 1.

I understand that the plaintiff wishes to drive the defendant to defend the taking of the goods at the railway

station off the demised premises. Possibly the defendant's difficulty may be in the fact that the goods were not at the time of removal the tenant's goods, he having assigned to the plaintiff, who claims, as I understand, under a deed of assignment in trust for creditors. If the parties desire to raise such or similar questions, the record may be amended for such purpose.

The demurrer will be allowed, with costs to the plaintiff in any event of the cause. The defendant to have leave to amend within a week from this date.

Judgment for plaintiff.

[COMMON PLEAS DIVISION.]

JACKSON V. STALEY.

Libel—Publication—Evidence of—Onus of proof.

The plaintiff had been a servant of the defendant, and on leaving the defendant's service, asked for a statement of account, whereupon the defendant made out an account as follows: "Mr. Joseph Jackson to Wm. Staley, Dr." Amongst the items were the following: "Stole hay during winter, \$4.00," and "stole hatchet-hammer, \$1.50." The account was placed in an unsealed envelope and handed to M., the plaintiff's then employer, who took it the plaintiff's house and put it on the table between the plaintiff and his wife while at supper. The wife took up the envelope and taking out the account read it to the plaintiff who could neither read nor write. There was no evidence to show that the defendant knew that the plaintiff could not read, the only knowledge that defendant could have had being that the wife had signed plaintiff's contract with defendant, but it did not appear that the defendant's attention was called to this fact or that he knew that the signature was not the plaintiff's own hand writing; nor was there any evidence that M. read the account or took it out of the envelope, and he was not called as a witness. In an action of libel on the account, it was *Held*, that there was no evidence of publication; and as the onus of proof thereof was on the plaintiff, the action failed.

THIS was an action for slander and libel.

The cause was tried before O'Connor, J., and a jury, at Kingston, at the Spring Assizes of 1885.

There was no evidence of the alleged slander, and the learned Judge so directed the jury without objection.

The alleged libel consisted of an account sent by the defendant to the plaintiff, and which, so far as material was in the following words:

" December 2, 1884.

"Mr. Joseph Jackson to Wm. Staley, Dr.:

Sept. 25, 1883.	To three trips to village with horse..	\$3 00
	Three meals, board and lodging for	
	self, wife, and family	2 00
December.	Broke one manure fork carelessly..	1 00
	Stole hay during winter	4 00
April.	Broke one pair harness driving wood	
	for yourself	1 50
June.	Stole one hatchet hammer	1 00."

The whole account consisted of an account of wages due by defendant to the plaintiff, the above being a contra account which the defendant claimed he had against the plaintiff, and which overbalanced the amount due for wages.

The additional evidence so far as material, is set out in the judgment.

It was objected that there was no evidence of publication. This was overruled.

The jury found for the plaintiff, with \$75 damages.

In Easter Sittings, *Britton*, Q. C., obtained an order *nisi* to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

During the same sittings, June 4, 1885, *Britton*, Q. C., supported the order. There was no evidence of publication: *Phillips v. Janzen*, 2 Esp. 624; *Wenman v. Ash*, 13 C. B. 836; *Clutterbuck v. Chaffers*, 1 Stark. 471; *Dela-croix v. Thevenot*, 2 Stark. 63; *Thompson v. Bernard*. 1 Camp. 48. The occasion also was privileged. The relationship of master and servant had existed, and no malice is shewn. The writing is, however, not defamatory; at all events its meaning is doubtful. It might readily be argued that what was meant was that the things had been stolen by some one, and then plaintiff had got them, and without any intention of accusing the plaintiff of stealing them himself: *Heming v. Power*, 10 M. & W. 564, 569.

McIntyre, Q. C., contra. There was clear evidence of publication. It has been held that a letter addressed to a wife is sufficient evidence of publication. Here the letter is sent open, and is placed on the table, and is read by the wife: *Odgers* on Libel and Slander, p. 151-4. The occasion did not authorize the communication to the plaintiff's wife. There is no privilege. The case of *Wenman v. Ash*, 13 C. B. 836, clearly shews that this constitutes a publication, and that there was no privilege. The letter was clearly defamatory, and even though its meaning were doubtful it was left to the jury, and they found for the plaintiff. The Judge told the jury that the question was for them to decide: *Addison* on Torts, 5th ed., 152; *Clark v. Molyneux*, 3 Q. B. D. 237-243.

June 27, 1885. ROSE, J.—It appeared that the defendant had engaged the plaintiff as his servant, and that after about a year of service there was some disagreement which led to the plaintiff leaving his employment. The plaintiff requiring a statement of account, the defendant sent the account to him by the hands of his then employer, one Murdock, who delivered it at the plaintiff's house, placing it on the table between the plaintiff and his wife while at supper. The wife took it up and taking the account out of the envelope read it to her husband. The envelope was open, but not sealed. The plaintiff could neither read nor write.

The wife took the account to a friend, and under his advice she went with it to the plaintiff's solicitors, to instruct them to sue the defendant for a balance of wages claimed by the plaintiff, but which, according to the account, was overbalanced by the contra charges. The plaintiff was successful in his suit brought in the Division Court, recovering about \$15. After that suit, at the suggestion of his solicitors, this action was brought.

There is no evidence that Murdock read the account, or took it out of the envelope, or that the defendant knew that the plaintiff could not read. The only evidence

which is, suggested as leading to such a conclusion, is the fact that the plaintiff's wife signed the contract under which the services were performed. It is not shown that the defendant's attention was called to this fact, or that he knew as a fact that the signature was not in the plaintiff's own hand writing. Moreover, it would not follow that because he could not write he could not read. This is the whole evidence of publication.

It is of course clear that if the account had been enclosed in an envelope addressed to and had been received by the plaintiff's wife, and had contained libellous words, that would have been a publication: *Wenman v. Ash*, 13 C. B. 836. Or if the defendant had known that the plaintiff could not read, and had sent it knowing, as in such case he must have known, the plaintiff must have some one else to read it for him: *Delacroix v. Thevenot*, 2 Stark. 63; but otherwise if it was addressed to the plaintiff and he shew it to another, for the defendant would not be responsible for such publication by the plaintiff: *Barrow v. Lewellin*, Hob. R. 62.

It does not seem that the fact of a letter being sent unsealed by the hands of a third party makes any difference, if the third party did not read it: *Clutterbuck v. Chaffers*, 1 Stark. 471.

It was not suggested in this case, either in the evidence or by counsel at the trial, or in argument before us, that Murdock read the account. He was not called. There was no reference made in the learned Judge's charge to the fact of his having had an opportunity to read it, and the plaintiff's counsel did not ask the learned Judge to leave any such question to the jury.

As therefore the defendant sent the account to the plaintiff in an envelope, though not sealed, and his wife obtained it under the circumstances detailed, there being no evidence that the defendant had any knowledge of the plaintiff's inability to read, and there being no evidence that the third party, Murdock, read it, I am unable to find any evidence of publication; and in my opinion the plaintiff must fail.

As I have said it has not been contended that the carriage by Murdock of the unsealed envelope was evidence of publication. It could at the most only be urged that the entrusting of the account in an open or unsealed envelope was some evidence of negligence which rendered it possible for the messenger to read the account, and therefore it became necessary for the defendant to call him as a witness to remove the doubt and enable the jury to say that he did not read it. No case has gone that far, and I am not prepared to lay down any such rule. In my opinion the onus was on the plaintiff to prove publication; and proof of a letter having been sent by a messenger in an unsealed envelope is not without more evidence which removes the onus.

Why should a messenger open an unsealed envelope? If so dishonest he would open a sealed envelope, if he could escape detection, which would not be difficult with the ordinary envelope; and could a jury be asked to enquire as to whether the envelope was so securely sealed as to defy the curiosity of the messenger?

The case of words spoken where others might hear is not analogous, for the natural result of speaking in the hearing of others would be that they would hear, and the natural conclusion that they were intended to hear; and the defendants would be required to shew that they did not hear. On the other hand it would not be the natural result of sending an unsealed letter by a messenger, that he would be so dishonorable as to read it; and the fact of so sending it would not, it seems to me, be any evidence of an intention that he should read it.

I am the less unwilling to find the fact of publication unproven, as an examination of the evidence of the plaintiff and his wife as to the receipt of the envelope and account, shows a carelessness and inaccuracy of statement that renders the whole of their evidence very untrustworthy.

It would seem also from the evidence that the charge made in the account did not strike them as very insulting or worthy of notice, as it did not occur to them to seek

any redress until after the action in the Division Court when the suggestion came from their solicitor.

The motion must be allowed, and judgment entered for the defendant, with costs.

CAMERON, C. J., and GALT, J., concurred.

Order absolute.

[COMMON PLEAS DIVISION.]

IN THE MATTER OF THE BELL TELEPHONE COMPANY.

Patent of invention—Minister of Agriculture—Jurisdiction—Disputes as to patent becoming void—Functions, ministerial or judicial—Attorney-General.

On a motion for a writ of *certiorari* to bring up into this Court all the proceedings, &c., before the Minister of Agriculture, including his decision therein, on an application made before him to have a patent declared void for non-compliance with the provisions of sec. 28 of the Patent Act of 1872:

Held, that the Minister of Agriculture, or his deputy, had jurisdiction under sec. 28 to decide any dispute as to whether a patent had become void for non-observance or violation of the provisions of that section.

Semble, that the Minister's duties are ministerial, and therefore cannot be reversed or reviewed in a Court of law; but, even if judicial, this Court cannot interfere on the ground of a total want of jurisdiction on the Minister's part to make the inquiry, for, so far at least as this Court was concerned, this must be considered *res judicata* by the decisions of *Smith v. Goldie*, 9 S. C. R. 46, and *Re Bell Telephone Co. and Minister of Agriculture*, 7 O. R. 605; nor was there a partial want of jurisdiction, by reason of the neglect of the Minister to examine witnesses on oath or his refusal to issue summonses for witnesses to attend before him, because under sec. 28 this was not required: and

Quære, whether also, if judicial, the Provincial Courts have jurisdiction to interfere with such a tribunal, it being, on this assumption, a Dominion Court,

Semble, that on an application to question a patent under the Statute the intervention of the Attorney-General is not essential.

A writ of *certiorari* was therefore refused.

THE Bell Telephone Company, by their solicitor, S. G. Wood, gave notice on the 11th day of May, 1885, by direction of Mr. Justice Galt, that the Common Pleas Divisional Court would be moved on the 19th May, 1885, or as soon

as counsel could be heard, for an order that a writ of *certiorari* do issue to remove the proceedings, and all declarations, evidence, documents, papers, and writings, including the decision of the Minister of Agriculture in the matter of an application for the cancellation of Patent No. 7789, dated 23rd August, 1877, granted to Alexander Graham Bell for "Bell's system of Telephony," from the office or department of the Minister of Agriculture and Commissioner of Patents, into the Common Pleas Division of the High Court of Justice.

It appeared that by petition, dated the 2nd day of September, 1884, presented to the Minister of Agriculture, the Telephone Manufacturing Company prayed that letters patent of invention for the Dominion of Canada, No. 7789, dated 22nd August, 1877, should be declared to have become, and to be null and void, on the ground that the patentee and assignees of the patent, the Bell Telephone Company, had failed to comply with the provisions of section 28 of the Patent Act of 1872, in that since the expiration of twelve months from the granting of the said patent they had at various times imported, or caused to be imported, into Canada, the invention for which the said patent was granted; and the said the Bell Telephone Company at various times after the expiration of two years from the granting of the said patent refused to sell the invention, and also refused to lease the invention, so that parties desiring to use it have not been able to obtain it.

Notice of the petition was given to the Bell Telephone Company; and on the 20th day of October, 1884, the petitioners and the Bell Telephone Company appeared by counsel before the Minister of Agriculture, the Honorable J. H. Pope, and the counsel for the company objected that the petitioners had no *locus standi* to entitle them to a hearing, having no specific interest in raising a dispute: that the Minister had no jurisdiction in the case, and should not proceed with it, the more so as there was no power vested in him to summon witnesses and to administer an oath to them.

The Minister decided that there was a dispute, and that he was bound to act upon it, seeing that he or his deputy had alone jurisdiction in such matters.

The case was then proceeded with, and evidence, according to the report of the Minister, was taken on both sides, and consisted of official documents of the patent office, of certified copies of customs entries, of accounts furnished, of letters and correspondence exchanged between agents of the Bell Telephone Company and various parties, of statutory declarations, and of verbal evidence of witnesses brought on both sides whose depositions were taken at length by short hand reporters; and on the 24th January, 1885, the Minister of Agriculture delivered his decision, reciting the proceedings, and winding up as follows: "Therefore I decide that Alexander Graham Bell's Patent, No. 7789, for "Bell's system of Telephony" has become null and void under section 28 of the Patent Act of 1872."

It further appeared that on the 15th day of October, 1884, the Bell Telephone Company of Canada commenced an action against the petitioners the Telephone Manufacturing Company of Toronto for infringement, among other things, of the patent in question.

During same sittings, May 21, 1885, *Lash*, Q.C., and *S. G. Wood*, supported the motion. There is clearly the right to the *certiorari*: *Rex v. Plowright*, 3 Mod. 95; *Rex v. Glamorganshire*, 12 Mod. 403; *Arthur v. Commissioners of Sewers in Yorkshire*, 8 Mod. 331; *Groenvelt v. Burwell*, 1 Salk. 263. There was no dispute within the statute. The parties attempting to raise the dispute have no *locus stundi*. The only person who can interfere is the Attorney-General: *Ware v. Regents Canal Co.*, 3 De G. & J. 212; *Re Bell Telephone Co. and Minister of Agriculture*, 7 O. R. 605. The mode of taking the evidence was improper. The evidence should have been taken on oath, and the Minister should have granted summonses for the witnesses to attend before him. This is an incident of the Court: *Maxwell* on Statutes, 2nd ed., p. 443.

F. Arnoldi, and *J. R. Roaf*. The decision of the Minister of Agriculture as Commissioner of Patents cannot be reviewed in a Court of Law, and therefore the motion for the writ of *certiorari* must be refused; also the tribunal, having been held by Mr. Justice Osler, in his judgment in 7 O. R. 605, to be a Court, it is a Dominion Court being constituted by the Dominion Parliament, and therefore its decision cannot be interfered with by this Court, which is a Provincial Court. The parties raising the dispute have a *locus standi* to do so, and the intervention of the Attorney General is not necessary; and in fact he has no authority to interfere. The Minister himself in the exercise of his supervision over patents, has the right himself to interfere on its being brought to his notice that the condition on which the patent was granted was violated. The evidence was properly taken. There is nothing in the Act or any power incidental to the Court, as a Court, which requires the evidence to be taken on oath, or the issue of summonses for witnesses. The applicants, however, are estopped from raising this objection as they attended before the Minister, cross-examined the witnesses called by the petitioners, called witnesses themselves, and submitted documentary evidence. They referred to Dominion Interpretation Act, 31 Vic. ch. 1, sec. 7, sub-sec. 25; *American Bell Telephone Co. v. Spencer*, 8 Fed. R. 509; *Merwin* on Patentability of Inventions, 597.

June 27, 1885. CAMERON, C. J.—I am of opinion whether the Minister of Agriculture's functions as Commissioner of Patents are ministerial, as was held by Mr. Justice Henry in *Smith v. Goldie*, 9 S. C. R. 46, 68, or judicial, according to the view of Mr. Justice Osler in the matter of these applicants against the said Minister: 7 O. R. 605, 609, he had jurisdiction, under section 28 of the Patent Act of 1872, to decide any disputes as to whether the applicant's patent had become void for non-observance or violation of the provisions of that section. The right to a patent under the Act is not absolute, but depends upon the opinion of

the Commissioner as to whether the alleged invention is open to any of the objections indicated in the five sub-sections to section 40 of that Act, subject to an appeal from such opinion to the Governor-in-Council. The provision for an appeal to the Governor-in-Council would seem to denote that in the matter of granting a patent the Minister's duties were regarded as ministerial and not judicial. On an application for a patent of invention there are no disputants before him except in the case of interfering applications under section 43, and he decides upon the *ex parte* application of the applicant whether such applicant shews himself entitled to secure the monopoly conferred by letters patent issued under the Act. No matter how plain and clear the applicant's right may be to obtain a patent unless the Commissioner of Patents approves, or disapproving his disapproval is reversed by the action of the Governor-in-Council, he cannot obtain a patent. The Government thus keeps control by its special member, the Minister of Agriculture as Commissioner of Patents, in the first instance, and afterwards by the power of reversal conferred upon the Governor-in-Council on the subject; and by section 28 the power would seem to be unequivocally given to the said Commissioner, as a ministerial function, to say whether the patentee has violated the express conditions upon which as between him and the Government he was accorded the protection provided by the Act for his invention.

In the case of interfering applications, when a judicial consideration would seem to be called for, the Minister does not act except to the extent of appointing one or more, according to the circumstances, skilled persons, to decide between the rival applicants. The skilled persons appointed as arbitrators act judicially. The machinery is provided for the summoning and swearing of witnesses, and thus they have full power to inform themselves as to which applicant has the right. The scheme of the Act seems to be where the right to obtain a patent is disputed by another person claiming the same right for

a like invention or where a patentee's patent has been infringed the matter is not for the decision of the Commissioner, but must receive a *quasi* judicial consideration in the first case, and an actual judicial consideration in the other. No machinery is provided for bringing the breach or neglect by a patentee of the provisions of section 28 before the Minister. But it may well be assumed that the Minister, by his supervision of the public interests within the control of his department, would cause himself to be informed through subordinates of the neglect of a patentee to carry on the construction or manufacture of the invention within two years, or of his violation of the condition against importing the invention after the expiration of twelve months from the granting of the patent. If the patentee, on being called on by the Minister to answer such information, disputes having committed such breach, the Minister's duty would be to investigate the matter and settle the dispute, or it may well be that as matter of administrative policy, should any person wish to impeach a patent under section 29, on the ground that the patent has become void under section 28, he should be required to obtain the decision of the Minister of Agriculture upon the question before applying to the Courts as indicated in the said section 29, and it would not be necessary that the Minister should be made acquainted with the facts in the same formal and solemn way that prevails in Courts of Justice.

If the decision is against the patentee, he is only deprived of a privilege by the officer through whom it was conferred, and who had the power of denying it to him in the first instance. If the complainant fails he is only precluded from urging against the validity of the patent an *ex post facto* matter that would not concern him individually as much as it would the Government as a matter relating to policy and revenue.

If the Minister acts ministerially and not judicially, it is conceded his decision cannot be reversed or reviewed in a Court of law, and the writ of *certiorari* must be denied to the applicant.

But assuming that the Minister's position is judicial, this Court is precluded from interfering, on the ground of a total want of jurisdiction on his part to make the enquiry, as this must be considered, at least as far as this Court is concerned, *res judicata* by the decision of the Supreme Court in *Smith v. Goldie*, 9 S. C. R. 46, and of Mr. Justice Osler in *Re Bell Telephone Co. and the Minister of Agriculture*, 7 O. R. 605.

There remains then only the question, was there a partial want of jurisdiction caused by the absence of some preliminary omission or observance essential to complete jurisdiction?

It is contended that the neglect to examine the witnesses on oath, and the refusal to grant summons to witnesses to attend before the Minister to be examined, were such defects and irregularities as made the proceedings void, and so open to be removed into this Court, in order that no action should be taken thereon till reviewed, and the validity of the proceedings determined.

If the statute required the Minister to take evidence under oath and he neglected to do so, assuming his functions to be judicial, I have no doubt a *certiorari* would lie, and that in this case it would be *ex debito justitiæ* and not merely discretionary, as the right of the applicant to exercise the privilege granted to him by his patent is invaded by the decision: *The Queen v. Justices of Surrey*, L. R. 5 Q. B. 466.

But I do not think the Minister was required to take evidence under oath, nor to require by any formal order the attendance of witnesses before him.

The necessity of giving power to compel the attendance of witnesses, and the taking of their evidence on oath, was present to the framers of the Act when clause 43 was enacted, and the maxim *expressio unius est exclusio alterius* applies, demonstrating the intention of the Legislature, that in the exercise of his functions under section 28 the Minister should inform himself upon the matter in dispute by any means he thought proper, not contrary to

the principles of natural justice, but not restricted to the modes of taking evidence in Courts of justice.

The objection taken by Mr. Arnoldi to the jurisdiction of Provincial Courts to question the decision of the Minister of Agriculture, assuming him to be acting judicially, is an exceedingly formidable one, and may be entitled to prevail, as it can hardly be said that Provincial Courts created by local Legislatures have inherently power to reverse the decisions of Courts created by the Parliament of the Dominion. To so determine, however, is not essential to the decision of this application; and I do not, therefore, intend to decide it.

The applicants' motion must be dismissed, with costs.

I have not overlooked the contention that no private party has a right to question the validity of the patent, and that it must be assailed through the Attorney-General. But were the character of the functions of the Minister judicial, I do not think, in face of the express language of the statute giving to any person the right to impeach a patent in the manner indicated in sec. 29, that the intervention of the Attorney-General can be deemed essential.

GALT, J., concurred.

ROSE, J., having an interest in the company, took no part in the judgment.

Motion dismissed.

[COMMON PLEAS DIVISION.]

YOUNG V. NICHOL.

Malicious prosecution—Issuing search warrant—Reasonable and probable cause—Relief—Questions for jury.

A robbery having been committed at the defendant's store a bill of an account due by the plaintiff to the defendant, which it was alleged had been rendered some time previously, was found lying near by, which from its crumpled appearance indicated that it had been carried about for some time in a person's pocket. From this the defendant said he suspected some one in the plaintiff's house, and he went to a magistrate and laid an information, upon which a search warrant was issued, and the plaintiff's house searched, but none of the stolen goods were found therein and no arrest was made. It appeared that the account which was found had never been sent to the plaintiff but a similar one had, the defendant stating that when he caused the search warrant to be issued, he was under the belief that the account had been sent, having forgotten the fact that it had not been. In an action for malicious prosecution, the learned Judge entered a verdict for the defendant, holding that the plaintiff had failed to shew that the defendant acted without reasonable and probable cause.

Held, there must be a new trial; that it should have been submitted to the jury to say: 1. Whether the account was sent to the plaintiff; 2. Was it found as alleged; 3. If not sent, did the defendant believe it had been so sent; and, 4. If defendant did so believe, were the circumstances such as to warrant a reasonable man of ordinary prudence to form such belief; and, *per* ROSE, J., it might be necessary also to submit to the jury the question, whether it was a prudent and reasonable thing for the defendant to rely on his memory.

Held, also, that an action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause.

Abrath v. North Eastern R. W. Co., 11 Q. B. D. 79, 440, commented on.

THIS was an action for malicious prosecution in obtaining a search warrant to search the house and premises of the plaintiff for goods stolen from the shop of the defendant.

The information laid by the defendant before P. D. Kelly, Esq., a Justice of the Peace, set forth that on the night of the 19th of May, 1884, a quantity of tobacco and dress goods and other articles of the defendant, were feloniously stolen by some person or persons unknown from and out of the defendant's store at the village of Nicolston, and that he had just and reasonable cause to suspect and did suspect that the said goods, or some of them, then were concealed in the dwelling-house, shop and outbuildings of the plaintiff, from the fact that a certain document was

found in the said store which was in the possession of the said plaintiff; wherefore he prayed a search warrant might be granted to search the dwelling house, shop, and out-buildings of the plaintiff.

The defendant in his statement of defence alleged that on the night of the 19th May, 1884, his store had been broken into, and a quantity of his goods were feloniously stolen by some one to him unknown: that upon the following morning a search was made to ascertain if any mark, trace, or other evidence had been left that would furnish a clue to the officers of justice in tracing the guilty person or persons, and no mark or trace was found tending to cast suspicion upon any one except a certain account due by the plaintiff to the defendant, which had been rendered by the defendant to the plaintiff in the month of December previously, since which time it had not been in the possession of the defendant or on the said premises to the best of his knowledge and belief: that the said account presented the appearance of having been carried about in a pocket, and was found in said store in a position where it could not have remained unnoticed but for a very short time and near to the place from which a portion of the stolen goods had been taken; and on account of finding the said account under the circumstances, there being no other mark, trace, or evidence furnishing a clue to the perpetrators of the theft, the defendant had reasonable and probable grounds for suspecting, and did suspect, that the goods had been stolen by some person residing at the plaintiff's dwelling house, and the same were concealed in the said dwelling house, shop, or outbuildings.

The case was tried before Galt, J., and a jury, at Barrie, at the Spring Assizes of 1885.

The laying of the information by the defendant was proved by Patrick D. Kelly, the Justice of the Peace who took it, and the issuing of the search warrant thereon.

This witness was called by the plaintiff, and swore in cross-examination, that the defendant told him just about the same as the substance of the information. He said

a certain part of the goods had been stolen, and there was a document or paper found behind the counter that he took for granted had been in Mr. Young's, or Mr. Young's family's, hands, that had been given to Mr. Young or some member of his family. "I spoke, as I thought, any reasonable man would say, that I thought that was kind of *prima facie* evidence against him if such paper was found. I cannot say I told him that in talking over matters with Mr. Nichol, I might have said I thought that looked rather suspicious. I do not think I advised him * *. I am inclined to think Mr. Nichol asked me for a search warrant, and I told him if he wanted it he would have to lodge an information. I do not know who spoke of the information first. I do not think I suggested it. In talking over the matter I told him, speaking in general terms under such circumstances, I thought the better way would be to have a search warrant."

On re-examination he said: "Mr. Nichol came to my place, as far as I understood at the time, just the same as ordinary people do to lodge an information to secure his own. He came and told me the circumstances, and asked me what was the best course to pursue. I cannot say that he asked me the course to pursue. He spoke to me about the stuff having been stolen, and asked what was the best course to pursue, and I said if 'I was treated that way and had sufficient proof undoubtedly I would get a warrant'" He further said: "I recollect that he said that day (the day he came to lay the information), or the following morning, that a certain document was found that he believed had been in the possession of Young, and from that that he had reason to think they were the guilty parties—Young or his family * *. I cannot tell you exactly what he said."

The witness's evidence was exceedingly confused. At one time he would say that defendant asked him the best course to pursue; and then again would say he did not know whether he asked the course to pursue or not.

It was proved that nothing of the defendant's was found on making the search on the plaintiff's premises, and the plaintiff was not arrested.

The plaintiff himself gave evidence, and swore that the defendant and he had had previously a law suit, in which the plaintiff succeeded, and that nothing had taken place between them after that until the plaintiff's house was searched. He denied receiving the bill found in the defendant's store, but admitted he had received accounts from defendant which were produced, and were not the one said to have been found; and he also swore that he had not been near the defendant's place from the time he went there to settle accounts up to the time of the search. He said he received one of the two bills he had got from defendant; that he got it in October.

Thomas Young, son of the plaintiff, also swore to one account being rendered to the plaintiff before the 12th December and one which was dated 22nd December after; and that he had not seen the one of the 12th December alleged by defendant to have been found in the store; and that at the time they were trying to settle, Mr. Hodge, the person who made out accounts for defendant, asked defendant if he had served the bill, and defendant said "no, that it must be around somewhere," and defendant went out and came back with a bill and said, "pay that bill," and we commenced to compare them, and they were both about the same; and that it was after this that the bill of the 22nd December was received through the post office—that other bill.

This evidence is not given in the language of the witnesses, but the substance of it.

At the close of the plaintiff's case the defendant's counsel moved for a nonsuit, on the ground that no cause of action was made out by swearing to the information for a search warrant; and there was no evidence of want of reasonable and probable cause.

The learned Judge declined to nonsuit.

The defendant gave evidence to the effect, that sometime in the night of the 19th May his place was broken into, and a considerable quantity of goods taken; and on looking for traces his daughter found a bill, which had left his office some three, four, or five months previously, which was a bill sent to the plaintiff, and, as he understood, was found in the office on a chair that she had been sitting on the day before, near where the goods had been stolen. The defendant, in consequence of finding the bill, telegraphed to Mr. Hodge, the clerk who made out the accounts; and Hodge not coming as soon as he expected, he went and met him, and asked him about the account, and Hodge said it was an account that had been served on Young. He said it was left with defendant to do it. Hodge and he then went together to the magistrate. The defendant said he gave the account to a teamster. He did not say anything about that to Hodge. When they got to the magistrate's the defendant introduced the subject to him by shewing him the piece of paper, and calling on Mr. Hodge to testify. He told the magistrate he thought the piece of paper would throw some light on the subject. The paper was the account found. Had Mr. Hodge relate to him regarding the paper. Hodge said that was a paper served on the Youngs. The magistrate said the better way would be to get a search warrant for the stolen goods to see if they could be found. The defendant then said if there was likely to be any trouble afterwards about it, he would rather lose what he had lost than have anything to do with it, and he, the magistrate, said it was a common thing to search this man's house. That was before laying the information. The magistrate was supposed to be very good authority. The defendant thought that he named some one against whom he had suspicion. It was not the plaintiff. He never suspected the plaintiff; never suspected him any more than the difficulty on account of the paper. He could not understand that. He enquired of the magistrate about the suspected man, Tom Garbutt, who, he heard by report, made his residence at Mr. Young's. He did not deliver the account found to the plaintiff; it was another, he, defendant, delivered.

In cross-examination he said he told his daughter to telegraph for Mr. Hodge. He wanted to get an explanation about the paper. He telegraphed to make certain that the paper had gone to Mr. Young's. He did not know anything about it more than that he had left the paper with him to send up to Young's. Hodge had left him a paper in an envelope to send up to Young's, which he, defendant, did. Hodge said it was Young's account at the time he gave him the paper. The defendant said he knew that Hodge had given him the account, and asked him to send it. Then he said he did not know at that time; he did not recollect it. He had forgotten at the time of discovering the paper all about having sent it to Mr. Young, and sent for Hodge to see if he could throw any light upon it. His daughter had forgotten it, too. When he met Hodge he shewed him the paper, and asked him if he could explain it, and he then said that was the account that had been sent up to Young. He, defendant, knew when Hodge rehearsed it. Hodge said that is the account you recollect I gave to you to send by Tom. He then asked him to get into the buggy, and drive to Mr. Kelly's.

To the question—"Now a little while ago you said he gave you the account to deliver, and what you swore was that you had sent it by Tom, but you did not say that he had given you the account to send by Tom—now which was true, did your clerk tell you to send that by Tom or serve it on Young?" He answered—"I sent it by Tom." "Q. Which is the truth—did he give it to you to send by Tom, or did he give it to you to serve and you sent it by Tom—which is the truth? A. The truth was I sent it by Tom. Q. Did he tell you to send by Tom, or did you send it by Tom? A. He does not give me orders. He left the account for to be sent to Young. Q. He made out the account, and he does not know whether you sent it by Tom? A. Yes, he knew. I told him afterwards."

He said further: "It is a fact that I had my hand upon the account (the one present at the attempted settlement), and wanted to keep it. It is the fact I made out another account and mailed it, and did not serve it. The account,

dated 22nd December, is the account I mailed. It is something I cannot tell why I sent that after sending the other. It did not strike me that night; the man got so outrageous that I could not do anything with him. I do not quite recollect Mr. Hodge saying to me at the time of that settlement: 'Mr. Nichol, where is the account that I made out?' and I said I did not know, and went back in the room and came back with an account. The matter of that I will leave to others. It is quite likely they are right. It might be that I did go and get the account, but I do not recollect it."

Thomas Fleming—The teamster referred to in the defendant's evidence as "Tom"—swore he received a letter to deliver to the plaintiff, which the defendant said was a bill. He was not certain as to what time it was. He thought in October. He would not say as to the month. He saw plaintiff open the letter, and take out what he thought was a bill.

Martha Reid, daughter of the defendant, gave evidence as to the finding of the bill or account.

Mr. Hodge gave evidence as to making out the account of the 12th December: that he gave it to somebody, but could not say whether he handed it personally to Mr. Nichol. To the best of his knowledge he gave it to him to send to Mr. Young. On being asked the date, he said the date would be nearly that time (date of the account); of course it was after. Then on being shewn the account of the 12th December, he said he was wrong, that was not the account he thought it was when he first spoke. That account he could not say whether it was mailed or sent up. He was not sure he gave that account to Mr. Nichol; it was another account he expected to see. After receiving the telegram, he met the defendant who showed him the account of the 12th December, and asked if that account had been sent to Young, and witness said "yes;" and then they drove to Mr. Kelly's. He did not remember whether Mr. Kelly or Mr. Nichol asked if that account had been sent; one of them did.

In cross-examination he said he gave an account to Nichol to send in the fall of 1883. Mr. Nichol went out of the room and brought me another account in witness's writing; that was the account he had given Nichol to send; and that was the account he thought the Youngs would have brought, and then Nichol remembered he had not sent it. He left the room, returned and brought the account in his hand. He believed that account was taken by the Youngs. He remembered Nichol wanting to keep this account, putting his hand on it and saying he would keep it. He made out another account after this. He believed it was sent by mail. He did not remember whether the account of the 22nd December was the one made out afterwards. The defendant told Mr. Kelly he wanted a search warrant: that his goods had been stolen; and that he suspected Young as the thief; and he wanted to search Young's house. He did not remember the exact words. That was the substance or meaning of what he said. He did not hear any other man's name mentioned in regard to stealing the things then and there. He did not suspect any one.

On re-examination he said Mr. Nichol went and brought an account which witness had given him to send. It was an account witness gave him to deliver to them. The first account was made out by Miss Reid; witness had nothing to do with that. Then witness made out an account to be sent, which he believed was the account of the 12th December. Witness made out another account. He did not know what was done with it—that is what he wanted to get at. The account 12th December (Ex. 6) was given to be sent or went by post to Young's. There was an account which Mr. Nichol brought in at the time of the settlement which witness gave to him. That was not the account 12th December (Ex. 6). It is not any of the accounts produced.

At the close of the case Mr. Lount renewed his motion for a nonsuit; and, after argument, Mr. McCarthy contending there was a contradiction of fact, and that had to be submitted to the jury: that the important question was

not whether this account was found, but whether it was in possession of the plaintiff. If there was any evidence that it was contradicted; and, even if the plaintiff had the account that would not warrant the proceedings taken. If there was evidence of want of reasonable and probable cause, the jury may from that infer malice. Besides there was special evidence of malice.

The learned Judge said: "The law on this subject was elaborately considered in England in the case *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, in which it is laid down, the plaintiff has to prove reasonable and probable cause. In finding, as I do, I do not at all attribute or say there is any evidence whatever to show that the plaintiff had committed this offence, but at the same time I do not think there is any evidence whatever for the jury. It is incumbent upon the plaintiff to show that the defendant acted without reasonable and probable cause; for admitting that this account never was in the possession of the plaintiff the defendant's attention was called to it."

Mr. McCarthy—"That is the point for the jury. We say that the account was never given to us. We say that the account was always in Nichol's possession. He finds it in his own store, an account which Young never had, and if Nichol had that account what in the name of common sense would justify him in swearing out an information."

The learned Judge—"They are not called on to prove that he had reasonable and probable cause. It is for you to shew that he had not reasonable and probable cause."

After some further discussion by Mr. McCarthy, the learned Judge said: "What decides me is this. After the case of *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, it is perfectly clear that you have to give affirmative evidence; and in my opinion the plaintiff has not shown a want of reasonable and probable cause on the part of the defendant. I therefore dismiss the action."

In Easter Sittings, May 19, 1885, *McCarthy* Q. C., obtained an order *nisi*, calling on the defendant to show cause why the finding and judgment for the defendant should not be set aside, and a new trial had between the parties, on the ground that there was not reasonable or probable cause for causing the search warrant to be issued; and on the ground of misdirection on the part of the learned Judge in holding that there was reasonable and probable cause as aforesaid.

During the same sittings, June 5, 1885, *McCarthy*, Q. C., supported the order *nisi*. The only question is, whether there was reasonable and probable cause. The defendant said that because the account was found in his shop near where the goods were stolen from, he suspected the plaintiff, and had the search warrant issued. The evidence showed that this account had never been delivered to the plaintiff; and the defendant said he had forgotten at the time that it had not been delivered. The question whether the defendant believed or not that it had been delivered was most material, and should have been submitted to the jury. The learned Judge at the trial seemed to think, that whether it was delivered or not was of no importance, and if it were necessary to decide the fact, he thought it never had been delivered; but the defendant's belief was a most important ingredient in the case, and clearly should have been submitted to the jury. If the jury should find that he did so believe, then it would be for the Judge to say whether the circumstances were such as would warrant a reasonable man of ordinary prudence in so believing. Forgetfulness of itself is not sufficient. The defendant must make out affirmatively that there was reasonable and probable cause: *Mathias v. Yetts*, 46 L. T. N. S. 497; *Lister v. Perryman*, L. R. 4 H. L. 535; *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, 50 L. T. N. S. 274. The issuing of the warrant was an actionable wrong: *Cooper v. Booth*, 3 Esp. 135, cited in *Johnstone v. Sutton*, 1 T. R. at p. 535.

Lount, Q. C., contra. Where no one is mentioned in a search warrant, and no one is arrested, as in this case, no action will lie. The warrant was issued simply for a search. The foundation of the action of malicious prosecution is the putting the criminal law in motion against a person, and not the putting it in motion against his house. If the plaintiff had been apprehended, then there might be some ground for the action. Here the defendant stated that he did not know who had taken the goods. The learned Judge properly ruled at the trial that there was reasonable and probable cause, or rather that the plaintiff had failed to show a want of reasonable and probable cause. The question is, whether the defendant acted as a discreet man. If there was any dispute as to the defendant's belief it might be a question for the jury, but there is no dispute here. The question of reasonable and probable cause is for the Judge to decide: *Hicks v. Fuulkner*, 8 Q. B. D. 167; *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440; *Mitchell v. Williams*, 11 M. & W. 205, 216-7; *Lister v. Perryman*, L. R. 4 H. L. 535; *Hailes v. Marks*, 7 H. & N. 56; *Panton v. Williams*, 2 Q. B. 169.

June 27, 1885. CAMERON, C. J.—There is no doubt my learned brother correctly stated the rule of law, that in actions for malicious prosecution the affirmative of showing the want of reasonable and probable cause is upon the plaintiff, and that whether or not there is reasonable or probable cause is a question for the Court. But each case must depend upon its own special circumstances as to what will or will not constitute reasonable and probable cause, and in nine cases out of ten, if not ninety-nine out of a hundred, the question of reasonable and probable cause depends so much upon facts in dispute that the Court can only rarely decide without the aid of the jury.

In the present case, if the finding of the account alleged to have been found in the defendant's office after the alleged burglary had not been given in evidence, and the plaintiff had sworn as he did swear that he did not com-

mit the burglary sufficient would have been made to appear affirmatively to establish that there was no more reason for charging him with the offence than any other person in the community, and the absence of reasonable and probable cause, which would have imposed upon the defendant the burden of displacing the plaintiff's *prima facie* case thus made. Then if it were admitted that the defendant was told by a reputable person that the plaintiff had been seen, at a late hour on the night the offence was committed, coming out of the defendant's yard, where he then had no right to be, and that he was stopped and refused to give any account of what he was doing in the yard, and the defendant believed he was there for the purpose of committing, and had committed the offence, there would be reasonable and probable cause for causing him to be arrested, or for obtaining a search warrant to have his premises searched, and the Court would properly dismiss the action. But if it was disputed that the defendant was told that the plaintiff had been seen coming out of the defendant's yard at night, it would not be competent for the Court to determine, without obtaining the opinion of the jury on the question of fact disputed, whether reasonable and probable cause for the arrest, or obtaining the search warrant, existed or not. The Court might believe the defendant's story, but the jury might discredit it, and especially in such actions as the statute has assigned to be tried by a jury, and not by the Court, must the opinion of the jury be taken upon the question of fact.

In the present case the fact that the plaintiff had received the account which led to the suspicion that the stolen property might be concealed on his premises, was disputed, and should have been submitted to the jury to decide. Then conceding that a mistake on the defendant's part as to the plaintiff ever having been possessed of the account, would not be sufficient to make him liable, if he honestly believed that the plaintiff had in truth received it, his belief would be a question of fact for the jury, not for the Court; and so the case should have been submitted to the

jury for their opinion upon this point; and if they had found that he did so believe, it would have been for the Judge to decide whether, assuming the fact believed to have existed, it would have amounted to reasonable and probable cause. If it would, then the honest belief in its existence, though in fact not existent, unless the belief was a rash and wild one unsupported by the circumstances surrounding its formation, would also constitute reasonable and probable cause.

I cannot more clearly express what I mean on this head, than by quoting the definition of reasonable and probable cause given by Mr. Justice Hawkins in *Hicks v. Faulkner*, 8 Q. B. D. 167, at p. 171. He there says: "Now I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused. The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the Judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause. This also is an inference of fact, not of law as is sometimes erroneously supposed; and the Judge

is to draw it from all the circumstances of the case : *Lister v. Perryman*, L. R. 4 H. L. 535, 538, *per* Lords Chelmsford and Westbury."

Applying the principles so laid down there seems no room for reasonable doubt, that the opinion of the jury should have been taken as to whether the account of the 12th December had in fact been sent to the plaintiff; secondly was it found as alleged after the burglary in the shop; thirdly, if it was not sent to the plaintiff, did the defendant believe it had been so sent; and fourthly if he did so believe, were the circumstances on which his belief was based such as to warrant a reasonable man of ordinary prudence to form such belief?

The case of *Hicks v. Faulkner*, will be found an authority also for the position, that the forgetfulness of a fact, which, if not forgotten, would be reasonable ground for belief, will not disentitle the person so forgetting and honestly believing to the protection of the circumstances without the forgotten fact, that is, what has been forgotten may be treated as if it had never been.

This applies to the consideration of the question of the defendant's position, should it be found that the account which the defendant supposed, or states he supposed had been sent, was the one discovered in the shop after the burglary, and that it had never been sent to the plaintiff at all. Then would, under the circumstances, the conclusion at which the defendant arrived be such as a reasonable man of ordinary prudence would come to, and, if it would, was it reasonable for a prudent man to come to such conclusion without further enquiry.

I think, unless the objection taken by Mr. Lount, to the action lying at all for obtaining a warrant to search for stolen property is entitled to prevail, there must be a new trial, and in accordance with what took place between the parties at the trial, it must be with costs, such costs to be costs in the cause to the plaintiff in any event of the action.

That the objection is not a valid one, the case cited by Mr. McCarthy, of *Cooper v. Booth*, 3 Esp. 135, referred to in *Johnston v. Sutton*, in error, 1 T. R. 535, would seem to indicate.

The question was not one necessarily to be determined in that case, that action being in trespass against an officer of excise for entering under a warrant to search for concealed goods; but it was laid down the only remedy was by an action on the case for obtaining or executing the warrant from bad motives. In reason, if injury results, there would seem nothing to prevent such an action lying, and that it would lie, was the opinion of the Court in *Wyatt v. White*, 5 H. & N. 371.

It is true in that case, goods, in respect of which the search warrant issued, were found, and the person named in the warrant was arrested; but it did not seem to be questioned that for issuing such a warrant maliciously and without reasonable and probable cause, an action would lie; the question being, arrest or no arrest, was there a want of reasonable and probable cause for laying the information? If not, and injury resulted to the plaintiff, he would be entitled to be compensated for such injury.

Before concluding I ought perhaps to add with regard to *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, on which my learned brother Galt acted at the trial, while it lays down the law very decidedly that the plaintiff has to make out an absence of reasonable and probable cause, and that innocence *per se* of the charge preferred against the plaintiff, will not establish such absence, it does not go the length of determining that innocence coupled with the absence of all circumstances that would tend to show the plaintiff was more likely to have committed the offence charged than any other person in the community, would not be sufficient to make out a *prima facie* case of the absence of reasonable and probable cause which the defendant must answer.

The case had been submitted to the jury by Cave, J., with a charge which Brett, M. R., when the case was in

appeal, spoke of in the highest terms of commendation : and they were asked the three following questions ; " 1, Did the defendants, in prosecuting the plaintiff, take reasonable care to inform themselves of the true state of the case ; 2, Did they honestly believe the case which they laid before the magistrates ;" and 3, " Were the defendants actuated by any indirect motive in preferring the charge against the plaintiff." They were told " if they answered the first two questions in the affirmative, then the defendants had reasonable and probable cause for the prosecution, and were entitled to a verdict," and " that the onus of proving that the defendants did not take reasonable care to inform themselves of the true state of the case, and did not honestly believe the case which they laid before the magistrates, lay upon the plaintiff." In the Queen's Bench Division a new trial was granted, on the ground of misdirection on the part of the learned Judge in directing the jury, that the onus of proof, as stated by the learned Judge, lay with the plaintiff. In appeal this judgment was reversed.

And the Master of the Rolls, at page 452 of the report, makes the following statement. " After reading the judgment of Grove, J., I feel considerable doubt as to what was the real ground of the decision. I agree that if the question to be decided is whether there has been reasonable enquiry as to the truth of the case, and if the plaintiff gives evidence, which, unless it be answered, ought to lead the jury to the conclusion there has been a want of reasonable enquiry, and if the defendant gives no evidence at all, the jury ought to find the question in favour of the plaintiff. I further agree if the defendant gives evidence of facts which he desires to prove, it lies upon him to satisfy the jury that the circumstances alleged in his evidence, are correct."

Bowen, L. J., at page 456, states the criterion of, and meaning of what is called the onus or burden of proof succinctly thus : " Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a *prima facie* case, and nothing

is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. * * So soon as a conflict of evidence arises, it ceases to be a question of onus of proof."

In the present case the plaintiff swore to his innocence, and denied that he ever had possession of the account which was the only thing to connect him with the alleged theft. When that case was made out the plaintiff would have been entitled to succeed. The existence of reasonable and probable cause would be disproved, and malice might be inferred from its absence; but the previous litigation between the parties in which the plaintiff was successful, was some evidence of actual malice; and the plaintiff, applying the test suggested by Bowen, L. J., was entitled to succeed. When the defendant gave his evidence there was a conflict between it and the plaintiff's, to settle which the opinion of the jury was essential.

In the still more recent case of the *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, 50 L. T. N. S. 274, in which *Abrath v. North Eastern R. W. Co.* was cited, it was held that it was not enough to ask the jury whether the defendant *bona fide* believed in the truth of the alleged false and malicious charge, but they should also have been asked whether the defendant had satisfied himself of the truth of his belief.

I presume the word truth was used as a synonym for correctness. To my mind there is no room for contending that *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, is an authority against the right of the plaintiff to have this case submitted to the jury.

ROSE, J.—I agree that there must be a new trial.

I desire to add merely that according to the case of *Hicks v. Faulkner*, 8 Q. B. D. 167, referred to by the Chief Justice, it may be necessary to submit to the jury the question whether it was a prudent and reasonable thing for the defendant to rely upon his memory. If in the past it had often proven unreliable, then he was guilty of great imprudence in trusting to it.

There must of course be evidence as to the fact either by cross-examination or otherwise.

GALT, J., concurred.

Order absolute.

[COMMON PLEAS DIVISION].

JEFFERY v. HEWIS.

Assessment and taxes—Invalid assessment—Sale—Validity—R. S. O. ch. 180, sec. 156, construction of.

In the year 1875 a lot of land containing 200 acres and patented as one lot was assessed on the resident roll as lot 114, 200 acres, value \$1,000. From 1876 to 1878, it was similarly assessed. In 1879 it was also so assessed, except that the quantity of land was stated to be 100 instead of 200 acres. The whole 200 acres was occupied by a tenant who duly paid the taxes for each year including 1879. On the non-resident roll for 1879, the east half of the lot appeared assessed as 100 acres, value \$800. By reason thereof it was returned to the county treasurer as in arrear for the taxes of 1879, and a sale thereof made.

Held, the sale for taxes was invalid: that the assessment on the resident roll for 1879, was of the whole lot upon which the taxes were paid, the mistake in stating the quantity of land to be 100 acres not making such assessment less an assessment of the whole lot, while the error of putting the east half on the non-resident roll could not affect the owner's right to the land.

Quære, as to the effect of the curative provisions of sec. 156 of the Assessment Act, R. S. O. ch. 180, since the decisions of the Supreme Court, in *McKay v. Chrysler*, 3 S. C. R. 436, and whether a tax deed may be questioned for irregularities in the assessment or in the proceedings prior to sale after the lapse of the two years.

THIS was an action brought by the plaintiff to recover thirty acres of the east half of lot 114, in the 1st concession of the township of Tay, in the county of Simcoe, as the owner in fee of the said lot.

The defendant defended claiming the said thirty acres under a conveyance thereof from one William B. Sanders, who claimed to own the same under a purchase of the said thirty acres at a sale for taxes by the treasurer of the county, and a deed executed to him, his heirs and assigns by the warden and treasurer of the county, dated 5th February, 1884, the sale having taken place on the 14th December, 1882, more than two years before this action.

The cause was tried before Galt, J., and a jury, at Barrie, at the Spring Assizes of 1885.

It appeared from the assessment rolls of the township, that in 1875, the plaintiff's tenant Dingman was assessed for lot 114, 200 acres, valued at \$1,000. That in 1876 the lot was assessed as 200 acres to Dingman, as occupant, and H. E. Jeffery as owner, valued at \$1,000. In 1877, the lot was assessed to Dingman as occupant, at the same rate. In 1878 it was also assessed to Dingman alone; and in 1879 it was assessed to Dingman as tenant, and Mrs. Jeffery as owner, and valued as before at \$1,000, but the quantity of land was stated to be 100 instead of 200 acres. On the collector's roll for 1879 it appeared that John Dingman paid \$21.74, the taxes on 114, 100 acres, \$1,000. On the non-resident assessment roll for 1879, the east half of the lot appeared, 100 acres, assessed at \$800; and it was by reason of the land so appearing on the non-resident roll that it was returned to the treasurer of the county as in arrear, and the sale was made.

The learned Judge found that the plaintiff's tenant of the land had paid the taxes, and so there were no arrears in respect of which the property was liable to be sold; and he entered judgment for the plaintiff.

In Easter sittings, *O'Sullivan* moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

During the same sittings, June 6, 1885, *O'Sullivan* supported the motion. The taxes were imposed for the east

half of the lot on the non-resident roll, and they clearly have not been paid. The plaintiff contends that this was a mistake, and that the land never should have been placed on the non-resident roll; but the object of section 156 of the Assessment Act, R. S. O. ch. 180, was intended to cover just such mistakes, so that after the lapse of the two years the deed could not be questioned: *McKay v. Chrysler*, 3 S. C. R. 436. It must also be considered that the plaintiff was not the tax purchaser but purchased from the latter without notice of any defect. He also referred to *Austin v. Armstrong*, 28 C. P. 47; *Smith v. Midland R. W. Co.*, 4 O. R. 494; *Fleming v. McNabb*, 8 A. R. 656; *Silverthorne v. Campbell*, 24 Gr. 17.

H. H. Strathy, contra. There were no taxes in arrear at the time of the sale, and therefore the sale cannot be supported. The lot was assessed each year as the whole lot, 200 acres, and the tenant each year paid the taxes. The assessment of the lot in 1879 was of the whole lot; it was assessed as lot 114. This would mean the whole of lot 114, and the additional description of 100 acres may be treated as surplusage: *Iler v. Nolan*, 21 U. C. R. 309; *Gillen v. Haynes*, 33 U. C. R. 516; *Jamieson v. McCollum*, 18 U. C. R. 445. The subsequent assessment of the east half as non-resident cannot affect the plaintiff.

June 27, 1885.—CAMERON, C. J.—I am clearly of opinion that the finding of the learned Judge was right. The lot being placed on the non-resident roll was a mistake on the assessor's part. The lot was patented as a whole lot, and there was no pretence for dividing it into the east and west halves. As the tenant Dingman was assessed for the whole lot in previous years, it was the duty of the assessor to have assessed him in 1879 as he had done in previous years, and I think he in fact did so, and the mistake in stating the quantity of the land as 100 acres did not make the assessment less an assessment of the whole lot. The error committed was in entering the east half on the non-resident roll, and that error, under the circumstances, cannot affect the plaintiff's right.

It is not necessary to say what would have been the rights of the parties if the assessor had, though improperly, assessed the west half only against Dingman. He did not do this. He assessed the land as lot 114 at the same rate as he had done in previous years, and the taxes, according to this assessment, were paid, and there were in fact no taxes in arrear for which the land was liable to be sold.

If authority were needed to support the plaintiff's contention that the whole lot must be deemed to have been assessed to his tenant, the cases cited by Mr. Strathy would be sufficient to show that the designation of the lot, and not the quantity of land mentioned, would govern. These were *Iler v. Nolan*, 21 U. C. R. 309; *Gillen v. Haynes*, 33 U. C. R. 516, and *Jamieson v. McCollum*, 18 U. C. R. 445.

Had the only objection to the validity of the tax deed been the error of the assessor in placing the east half of the lot on the non-resident roll, it would by reason of the opinion of the Judges of the Supreme Court, in *McKay v. Cryslar*, 3 S. C. R. 436, perhaps be necessary to consider again the effect of the curative provisions of section 156 of the Assessment Act, and whether sufficient doubt has been cast upon the soundness of the judgment of the Court of Chancery, in *Bank of Toronto v. Fanning*, 18 Gr. 391, approved as it has been by the present learned Chancellor, in *Smith v. Midland R. W. Co.*, 4 O. R. 494, to leave it still an open question whether a tax deed may not be vacated for irregularities in the assessment, or in the proceedings prior to the sale after the lapse of two years.

In the opinion of Burton, J. A., the case of *Jones v. Cowden*, in the Court of Error and Appeal, 36 U. C. R. 495, is decisive upon the point. See his remarks upon the opinions of the different Judges of the Supreme Court, in *McKay v. Cryslar*, at page 667, of the report of the case of *Fleming v. McNabb*, in 8 A. R. 656.

GALT and ROSE, J.J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

MCARTHUR V. THE CORPORATION OF THE TOWN OF
COLLINGWOOD.

Municipal corporations—Drain—Negligent construction—Action—Compensation.

A drain was constructed by a municipal corporation, and by reason, as was alleged, of the negligent construction thereof it was not of sufficient capacity to carry away the water brought down it as was intended, or by reason of an obstruction negligently allowed to remain therein, the water overflowed the banks of the drain and damaged the plaintiff's premises.

Held, that the plaintiff's claim for the damage sustained was not one for compensation under the arbitration clauses of the Municipal Act; but was properly the subject of an action in which the findings of the jury should be had as to whether the damage was caused by such negligent construction, &c., or by *vis major*, namely, an unusual flood.

THE plaintiff sued the defendants, a municipal corporation, for damages caused to her property through the alleged negligent and improper construction of a drain on Oak street, in the town of Collingwood. The plaintiff owned and occupied lots 8 and 9 on the east side of the said street. The effect of constructing the drain was to bring a large quantity of water which before the drain was made used to flow by a natural water course, or creek, in a different course, along the front of the plaintiff's premises, doing no damage as long as the water was confined within the drain except in so far as the water caused by the snow or rain in the ordinary course of nature falling upon the premises, was hindered by the sides of the drain rising above the level of adjacent land from flowing away as rapidly as it otherwise would have done. But it was alleged the drain was not of sufficient capacity during a flood in the month of December, 1884, to carry off the water without the same overflowing the sides of the drain, and spreading over and upon the plaintiff's said land, against the buildings, and into the cellars, well, &c., and damaging the same and the plaintiff's goods and chattels therein.

The cause was tried before Galt, J., and a jury, at Barrie, at the Spring Assizes of 1885.

It appeared from the evidence that the defendants constructed the drain in question so as to join Underwood's Creek, and lead the waters that formerly flowed by the said creek, or a large portion of them, by the said drain, past the plaintiff's land, where in their natural flow they would not have gone, and the drain was not of sufficient capacity at the time of the overflow complained of to contain the accumulated waters brought down to the plaintiff's premises. There was also evidence, slight in character, that the drain, or canal as some of the witnesses called it, was narrowed as it approached the culvert under a railway running across the street, which caused the waters to be penned and flow back. The only evidence of negligent construction was the insufficient capacity of the drain, and its being elevated above the level of the street, which had the effect of keeping the overflowed water on the plaintiff's premises longer than it would have been if it had not been prevented thereby from flowing off. There was also some evidence of an ice jam in the creek, and a heavy flood ensuing.

At the close of the plaintiff's case the defendants' counsel objected that the case was one for arbitration under the Municipal Corporations Act, and that the action would not lie. The learned Judge adopted this view, but intimated in his opinion the case should be allowed to go on and the damages be assessed ; but if the objection was persisted in, and the Court held the case was not one for compensation by arbitration, the plaintiff should be entitled to the costs of the day without reference to the ultimate result of the action. To which counsel for the defendants consented, and the action was dismissed.

In Easter Sittings *Lount*, Q.C., obtained an order *nisi* to set aside the judgment entered for the defendant, and for a new trial between the parties, on the ground that the learned Judge was wrong in holding that the case should be settled by arbitration and the action dismissed.

During the same sittings, May 29, 1885, *Lount*, Q. C., supported the order *nisi*. The damages sought to be recovered are not those necessarily resulting from the work, but for defective construction of the drain in question. There was clearly negligence in the construction of the drain. The arbitration clauses therefore do not apply. He referred to *Reeves v. Corporation of Toronto*, 21 U. C. R. 157, 160; *Scroggie v. Corporation of Guelph*, 36 U. C. R. 534.

McCarthy, Q.C., contra. The plaintiffs complaint is, that by reason of the construction of the drain and the bringing of water down the drain the plaintiff's land was flooded. The drain was constructed under the defendants' statutory powers and was built for the purpose of bringing down water. The cases shew that when the act is done under the statutory right, and injury results therefrom, no liability attaches unless compensation is given under the Act: *McCarthy v. Metropolitan Board of Works*, L. R. 7 H. L. 243; *Ricket v. Metropolitan R. W. Co.*, L. R. 2 H. L. 175. The plaintiff's remedy is for compensation by arbitration if the case comes within the compensation clause. The drain was not improperly constructed, and was sufficient for the purpose for which it was constructed, and the damage was caused by a freshet.

June 27, 1885. CAMERON, C. J.—In determining whether the present case is one for compensation through the medium of arbitration or for which damages may be recovered in the ordinary way by action, it will be necessary to examine the several provisions of the Consolidated Municipal Act, 1883, 46 Vic. ch. 18, O.

Section 389 provides, "In cases where arbitration is directed by this Act, either party may appoint an arbitrator, and give notice thereof in writing to the other party, calling upon such party to appoint an arbitrator on behalf of the party to whom such notice is given."

By section 393 "In case of an arbitration between a municipal corporation and the owners and occupiers of, or

other persons interested in real property entered upon, taken, or used by the corporation in the exercise of any of its powers, or injuriously affected thereby, if, after the passing of the by-law, any person interested in the property appoints and gives due notice to the head of the council of his appointment of an arbitrator to determine the compensation to which such person is entitled, the head of the council shall, if authorized by by-law, within seven days appoint a second arbitrator, and give notice thereof to the other party, and shall express clearly in the notice what powers the council intends to exercise with respect to the property, describing it."

By section 394, "In any such last mentioned arbitration, if after service on the owner or occupier of, or person so interested in the property of a copy of any by-law, certified to be a true copy under the hand of the clerk of the council, the owner or occupier or person so interested omits for twenty-one days to name an arbitrator, and give notice thereof as aforesaid, the council, or the head, if authorized by by-law, may name an arbitrator on behalf of the council, and give notice thereof to such owner, occupier or person so interested, and the latter shall, within seven days thereafter, name an arbitrator on his behalf."

Powers are given by various sections to take lands for certain specified purposes.

And by section 482, sub-section 15, the council has power to pass by-laws "For opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up and pulling down drains, sewers or water courses, within the jurisdiction of the council, and for entering upon, breaking up, taking or using any land in any way necessary or convenient for the said purposes, subject to the restrictions in this Act contained."

By sec. 431, "The council of any municipality, upon any claim being made or action brought against any such municipality for damages for alleged negligence on the part of such municipality, may tender, or pay into Court, as the case may be, such amount as they may consider proper compensation

for the damage sustained, and in the event of the non-acceptance by the claimant of such tender or the amount paid into Court, and the action being proceeded with, and a verdict being obtained for a less amount than the amount so tendered or paid into Court, the costs of suit shall be awarded to the defendants, and set off against any verdict which shall have been obtained against them."

And by sec. 486, it is provided: "Every council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken, or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act."

The injury complained of is the negligent construction of the work, and the bringing of an undue and larger quantity of water to the plaintiff's premises in consequence of the insufficient capacity of the drain to contain all the water brought into it, and led thereby to the plaintiff's premises, not as the object of and contemplated as the result of the work, but by reason of the work not being of capacity to perform what it was designed to do, that is, to contain within its banks and lead to the lake the water that might flow into the drain. If it had been the intention to lead by the drain water to the plaintiff's land to its injury, then a case for compensation would have been made out, provided it appeared a by-law authorizing the work had been duly passed; or if by the construction of the drain in front of the plaintiff's premises the value thereof had been diminished by reason of any greater inconvenience or difficulty in getting access to the highway, there would apparently have been a case for compensation to be determined by arbitration. That is not, however, the case presented by the plaintiff's pleadings or on the evidence.

The work as a work is not complained of in the sense that it does of itself unused any harm or damage to the plaintiff, but being used to bring water along its channel, that water escapes and flows over upon the plaintiff's property to her detriment.

The case seems undistinguishable in principle from *Brand v. Hammersmith and City R. W. Co.* L. R. 4 H. L. 171. The plaintiff there, the owner of land, claimed against the defendants in respect of three distinct and different injuries alleged to be caused by the construction and user of the railway. 1. For the obstruction of light, air, and way. 2. For damage to the garden by lime, dirt, and smoke in the course of the construction of the railway; and 3. For the working of the railway, and the running of trains over it after it had been constructed and opened for traffic, which had occasioned and always would occasion vibration, noise and smoke, the said premises by reason of their being subjected to such vibration, noise, and smoke from passing trains were and always would be affected and further depreciated in value. The jury assessed the damages, separately under each head, allowing under the last £272.

The claim to compensation was made under the 68th section of the English Lands Clauses Consolidation Act, 1845, 8 Vic. ch. 18, which, as far as necessary to be considered in relation to this case, is as follows: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein which shall have been taken or injuriously affected by the execution of the works," &c., "such party may have the same settled either by arbitration or a jury * * as he shall think fit." It was held that damages under the last head were not recoverable on the ground, as I understand it, that the running of trains was legalized, and the injury arising from the use of the work after construction, was not such an injury as entitled the party injured to compensation under the clause above quoted.

The head note expresses correctly the conclusion arrived at by the majority of the law Judges in the House of Lords. It is as follows: "The Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act, do not contain any provisions under which a person whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway has been brought into use, even though the value of the property has been actually depreciated thereby."

This case was considered in the later case of *Hopkins v. Great Northern R. W. Co.*, 2 Q. B. D. 224; and Mellish, L. J., in delivering the judgment of the Court of Appeal, at page 236, thus states the result of that judgment. "Now, what was decided in *Brand v. Hammersmith and City R. W. Co.* was that the owner and occupier of a house was not entitled to recover compensation from a railway company, in respect of the nuisance and actual structural damage to his house caused by vibration arising from the running of trains after the line was opened; and the ground of the decision appears to us to have been that a railway company is not bound to pay compensation for damage necessarily caused by the running of their trains in the way authorized by their Act of Parliament after the line is open to the public. The two learned Lords, who formed the majority of the House on that occasion, carefully examined the different sections of the Lands Clauses Consolidation Act and Railway Clauses Consolidation Act bearing on the subject, and from that examination came to the conclusion that compensation is only given for damage caused by the construction of the railway and works, and is not given for damage caused by the user of the railway after it has been constructed and open to the public."

The act of the defendants in this case was not authorized by any express Act of Parliament, and if a by-law existed

for the construction of the drain, it was not shown. The parties then appeared to be governed by their common law rights, and at common law what was done would be actionable unless it can be excused by reason of the great and unusual character of the flood as to which a jury must decide, and not the Court. This question of negligence presented by the pleadings was one on which the opinion of the jury should have been taken.

I am, therefore, of opinion the judgment entered for the defendants must be set aside, and a new trial had between the parties. The costs of the former trial and of the proceedings in term to be costs in the cause to the plaintiff payable by the defendants in any event of the action.

ROSE, J.—Mr. McCarthy admitted that the damage must be such as could be ascertained at the time of construction to bring the case within the arbitration clause. I cannot see how the damage could have been the subject of enquiry at the time of construction for it could not have been in contemplation.

It seems to me to have been caused either by improper construction, obstruction negligently allowed, or by *vis major*.

In either of these alternatives the question was for the jury.

There is no law allowing a six feet drain where the volume of water requires a twelve feet drain. If according to all reasonable human judgment it could not have been foreseen that so great a volume of water would come down, then the municipality no doubt would be excused. The cause might be said to be *vis major*.

And so the municipality would not be justified in permitting the obstruction to be or remain so as to cause the flood, if by ordinary human forethought the obstruction could have been prevented or removed, and if not, then there would be no liability.

The fact of the overflow unless explained would lead the ordinary mind to the conclusion that the drain was too small for its requirements or had been obstructed.

I agree that there must be a new trial.

GALT, J., concurred.

Rule absolute for new trial.

[COMMON PLEAS DIVISION.]

GARLAND V. THOMPSON.

Action on a promissory note—Counter claim alleging fraud in obtaining note—Rescission—Action of deceit—Judgment for plaintiff on note—New trial on counter claim—O. J. A. Rule 321.

To sustain an action for deceit actual fraud must be proved, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law fully imputes to produce those consequences which are the natural result of his acts; and it must also be established that such fraud was the inducing cause to the contract, and must have produced in the mind of the person alleged to be defrauded an erroneous belief influencing his conduct.

In an action on a promissory note, the defendant counter-claimed, setting up that the note was given in part payment of the purchase money of certain land in Manitoba, which the defendant alleged that he was induced to purchase by plaintiff's false representation as to its value and location. The jury found the amount due on the note was \$1,590, but that the defendant was induced to enter into the contract to purchase the land by the plaintiff's fraudulent misrepresentations; and they assessed his damages at the above amount; and judgment was entered in defendant's favour.

Held, on the evidence, as set out below, there would be no rescission of the contract, but defendant must rely on his claim for damages for deceit; that the evidence failed to disclose actual fraud, at all events the only evidence which could be submitted to the jury was as to location, but while this was too slight to allow the verdict to stand, the Court did not feel justified in disposing of the case themselves, though perhaps they might do so under O. J. A. Rule 321. They therefore directed a new trial on the counter-claim, but so that plaintiff's legitimate claim on the note should not be delayed in the meantime, judgment was directed to be entered in his favour thereon.

THE plaintiff brought this action to recover the amount of a promissory note, made by the defendant to him, for the sum of \$1,450, payable four months after date, and dated 20th May, 1883.

The defendant did not deny the making of the note, but set up by way of counter claim that he, defendant, was a creditor of his son Albert W. E. Thompson for \$1,750: that the plaintiff was a trader and acquainted with the circumstances of Albert W. E. Thompson and the particulars of his estate; and the plaintiff claimed to own certain valuable land and premises in the town or village of Portage LaPrairie in the Province of Manitoba, and in order to induce the defendant to sell his claim against the said Albert W. E. Thompson, and to become the purchaser of the said lands, made the following representations which were and are false: that the debt of the said Albert E. Thompson was of little or no value: that it being assigned to the plaintiff would enable him to arrange the debts and affairs of the said Albert W. E. Thompson, in whom the defendant as his father was interested, the plaintiff agreeing to share equally with other creditors in respect of said debt, and by means of the assignment of the debt and the plaintiff's interest (? influence) to procure a discharge for the said Albert W. E. Thompson: that the lands in Portage La Prairie, being lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, in block No. 78 according to plan No. 94, prepared by J. B. Bannister, P. L. S., had been seen and were known to the plaintiff, and were worth in cash \$3,200, and were suitable for building lots and were within the limits of the said town or village of Portage LaPrairie, and were immediately saleable at a price that the plaintiff could realize a profit upon the same: that the plaintiff produced a map of the locality, and pointed out, as a further representation to the defendant, the situation of the lands on the said map erroneously—the said map was also erroneous and incorrect, shewing the said lands to be in a situation in reference to the buildings of the town which would make the same valuable and saleable. Upon these representations the defendant purchased the said real estate for the nominal sum of \$3,200, assigning the said claim of \$1,750 against his son in part satisfaction of the purchase money, and gave the plaintiff his promis-

sory note for \$1,450 for the residue of the purchase money, and the note sued on is a renewal of the said note for \$1,450: that the said representations were false and untrue to the knowledge of the plaintiff. The estate of the said Albert W. E. Thompson was in such a position that the plaintiff was able to recover the said promissory note, or the greater part thereof, for his own benefit, and retains the same without making any settlement of the affairs of the said Albert W. E. Thompson, and the whole of the representations as to the said lands were false and untrue: that the defendant upon discovery of the said fraud repudiated the same and tendered back the conveyance of the said lands to the plaintiff, and offered to reconvey them at any time; and the defendant asked that the contract should be rescinded and the moneys received by the plaintiff and realized on said claim against Albert W. E. Thompson should be paid over to the defendant, and that the said note should be delivered to be cancelled; or in the alternative that the defendant may be awarded against the plaintiff damages incurred by reason of the plaintiff's deceit and wrong in the premises.

The plaintiff took issue upon the counter claim.

The cause was tried before Galt, J., and a jury, at Hamilton, at the Spring Assizes of 1885.

The defendant, in his evidence, stated that he had known the plaintiff for fifteen years, and dealt with him for several years. His son Albert kept store on Manitoulin Island, and owed defendant some \$1,700 for money lent. He knew his son was getting into trouble. Garland knew all about the trade on the Island; and he recommended Albert to go there, and Albert bought some old stock from him. Garland told him that Albert was in a bad shape, but, of course, he, defendant, knew that. Garland proposed to give him, defendant, a block of lots in Portage LaPrairie, and that he would take the claim and settle with Albert's creditors, and he, defendant, was to take the lots and give him, Garland, the balance: that he would take his note for a year for the balance, \$1,450, the claim

against Albert and the note coming to what he put upon the lots, \$3,200, 16 lots at \$200 each: that he wanted to get the claim against Albert, as he was acquainted with the most of Albert's creditors. He said he could make a settlement with the creditors, and it would be better for the creditors for Albert, and all concerned. He was satisfied he could settle up Albert's business. Mr. Garland proposed the transaction with the object of getting a settlement for the creditors and him, defendant, out of difficulty. He proposed this transaction for the purpose of giving him, defendant, something for his claim, and settling up Albert's affairs. He, defendant, was in Manitoba before he dealt with the plaintiff. Mr. Garland asked him to go out there. He had been back and forth several times, and they were on friendly terms, and he wanted him to go out. He said that the defendant could get land, and there was some money to be made there. He, defendant, went in March, 1882. He went to Portage LaPrairie. The plaintiff took him to see his lands there. He drove along what is called the river road. There were about three feet of snow on the ground. When he got down to where he said he owned the land he pointed in the direction and said those lots were his. The locality is fixed in the evidence under the commission as Garrick's house. He pointed in front of the house. He said the lots in front of Garrick's house. Lots in front of the house were better situated than behind it; he, defendant, would say very much better. He did not get out of the cutter. He, defendant, made no reference to any particular lots when out there. He had proposed to deal with the Albert claim at that time. He, defendant, returned from Manitoba without dealing in any land except some government farm land. He got back in March. The plaintiff did not approach him till after Albert came home in May. In May the matter came up again. Mr. Garland left word for Albert to call and see him when he returned home, and Albert went to see him and brought up the subject. When Albert returned he told the defendant what Garland had said to him. In consequence he, defendant,

went to see Garland. The plaintiff made the same proposition again. He wanted him, defendant, to take the lots, and he would take the claim, and settle up with the creditors. He, defendant, did not want to take the lots. The plaintiff told him they were worth all he was asking for them in cash, and were most certain to rise in value. He, defendant, had no knowledge of the value except what he said. The plaintiff said they were worth cash \$3,200. He said that he, defendant, could sell them at a profit by keeping them a short time. He said he was willing to give a written guarantee to anybody that would buy the lots that they would rise in value. He, defendant, still did not take the lots. Albert was going back to Toronto, and he, defendant, sent word to Mr. Garland that he would take part of the lots and give him the claim against Albert. This was some time in May. He, defendant, sent word to say that if he would do that, plaintiff to meet him, defendant, in Hamilton. The plaintiff did not meet him in Hamilton. His, defendant's son, went to Toronto to see if he could settle with his creditors. That night his son told him what the plaintiff said; and on account of what he said he went to Toronto and found he was not likely to make any settlement with his creditors; and he, defendant, began to think perhaps he should have taken the plaintiff's offer. He came back and did take his offer, gave him the note, and took the lots. He, defendant, knew nothing about the lots except the time he went to see them. He got no information from anybody else about their value. The transaction was carried out in Hamilton in the office of Bruce, Walker & Burton. No one acted for him, defendant. They were the plaintiff's solicitors. He, defendant, saw a map in Mr. Walker's office of this property. (Map produced). This is not the map. The lots were in front of Garrick's house. At the interview in Mr. Walker's office, the plaintiff represented the lots as being high and dry, fit for building purposes, and fully worth what he, defendant, was giving for them. The plaintiff wrote him, defendant, about the time the note was coming due. He asked him, defendant, to renew the note.

He renewed it because Mr. Garland gave him to understand—told him in the first place he would have paid the note if he had had the money, and he always gave him to understand he, would not have that note to pay, because he defendant, supposed plaintiff did not think he, defendant had a right to pay it. He did not know why. He told him, defendant, that in Hamilton, going from the Dominion Hotel to Mr. Walker's office, where they renewed the note. The defendant did not pay any interest or discount. He proposed to pay the discount. When he first spoke about renewing the note he spoke about renewing it for a year, and when he got there he proposed to renew it for four months, and he paid the discount. He understood from the plaintiff that he would pay the note, and he, defendant, would never have to pay it. He did not know as there was anything very particular said about it, more than he understood the plaintiff would settle that note. He wanted it settled; he was afraid of it affecting this other suit of his—only for that. He understood from him he would settle it. He always said it was going to affect that suit. He did not say anything about coming on him, defendant, for that note. He did not think anything was said very definite about what he was going to do about the note. He did not wish to make any definite promises. He let it go at that, and gave him the renewal. He had not been able to get anything for the lots in question. He did not get an offer. He made some effort to exchange them for property in Ontario, a little, not much. He told the plaintiff in May, when he was going out, they were still friends, to try and dispose of them, and he said he would. He said he would, but he said not to try to shove sales as it would only affect the rest of his property. He had more property there. He does not know what the lots are worth now. He never saw the lots at all.

In cross-examination defendant admitted that he went to Manitoba for the purpose of speculating in land, and stayed with a cousin, a land agent in Portage LaPrairie, and had gone as near to the lots in question with him as

with the plaintiff, and that he was in the offices of other land agents enquiring about properties.

There was conflicting evidence as to the value of the property, some putting the value of the land in question and lands in neighborhood at from \$50 to \$300 a lot; and it appeared that, although there were no transactions in the sale of land in 1882, it was held at high prices. In 1883-4 & 5, it was not worth more than farm land, \$25 or \$30 an acre.

The jury found the amount due on the note was \$1,590; and that the defendant was induced to enter into the contract with the plaintiff by the fraudulent representation of the plaintiff; and they found the defendant's damages to be \$1,590; and judgment was entered in the defendant's favour.

In Easter Sittings, *Guthrie*, Q. C., obtained an order *nisi* to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

During the same sittings, June 4, 1885, *Guthrie*, Q. C., supported the order. There was no evidence to go to the jury of any false or fraudulent representation. The representation must not only be false and fraudulent, but it must be acted upon. The evidence shews that the defendant did not act upon it, but on his own personal knowledge. It is merely an attempt on his part to get rid of the property because its speculative value had fallen, or, as it is called, "the boom had burst." There certainly must be a verdict for the plaintiff. He referred to *Smith v. Chadwick*, 9 App. Cas. 187; *Schultz v. Wood*, 6 S. C. R. 585, 601, 611-15, 633.

Osler, Q. C., contra. There clearly was misrepresentation as to value, and also as to the location of the property. The case was properly left to the jury, and their finding cannot be interfered with: *Smith v. Land House Property Corporation*, 28 Ch. D. 7; *Kenner v. Harding*, 28 Am. R. 615, 617; *Graffenstein v. Epstein*, 33 Am. R. 171; *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Ingram v. Thorp*, 7 Hare, 74; *Wall v. Stubbs*, 1 Madd. 80; *Kerr on Frauds*, 2nd ed., 43, *et seq.*

June 27, 1885. CAMERON, C. J.—I am of opinion judgment should be entered for the plaintiff for the amount of the note and interest \$1,590 as found by the jury; and the evidence being very strong against there having been any deceit or fraud practised upon the defendant to induce him to enter into the contract to purchase the land, there must be a new trial upon the counter-claim with costs to abide the discretion of the Judge at the trial.

The defendant is clearly upon the facts not entitled to have the contract rescinded, and must rely upon his action for deceit. I do not think there is anything in the defendant's own evidence to make out a case for the jury; and were it not that he says the land he was buying was represented to be in front of Garrick's house there would not be a scintilla of evidence to submit to the jury.

As to that the circumstances would seem to be entirely against the defendant, and the evidence of the plaintiff and Mr. Walker, his solicitor, which is quite in accord with the probabilities, shews that the selection of the lots was made by the defendant himself from the map produced at the trial. Mr. Walker's words, as given in the shorthand notes, are: "This map now produced, or a duplicate of it certified by the same man, was then spread out. I asked Thompson if he had seen the lots, and he said he had. Garland told him he could select any lots on this map with the exception of those in front of the house which had been sold to Blackburn, and he sat down there. I suppose he was looking over the map half an hour, but finally he selected a block. He finally selected this one, and the conveyance of it was prepared."

If the defendant's evidence on this point had been much more explicit and positive than it is, the respectability of Mr. Walker, who has no interest in the question, should entitle his evidence to much greater weight than that of the defendant on account of the latter being directly and pecuniarily interested. But there being a conflict between the defendant and Mr. Walker, the credit to be attached to them is for the jury. And so, though the evidence of

the alleged deceit or fraud is entirely too light to justify the Court in allowing the judgment for the defendant to stand, I do not think we ought to take the case entirely into our own hands and determine it upon the material before us, as perhaps we have the power to do under Rule 321 of the Ontario Judicature Act.

In *Smith v. Chadwick*, 9 App. Cas. 190, Lord Selborne thus states the obligation of the plaintiff, who seeks to recover in an action for deceit, as to proof: "I conceive in an action for deceit like the present it is the duty of the plaintiff to establish two things: First, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the persons making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts. And, secondly, he must establish that this fraud was the inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief influencing his conduct."

I think in the present case, the defendant entirely failed to shew, in accordance with what Lord Selborne deemed essential, actual fraud; and that the defendant was induced by the representations of the plaintiff to enter into the contract. About the time this transaction took place there was much wild and injudicious speculation in lands in Manitoba and the North-West, and the defendant bought, unfortunately for himself, just shortly before the time at which, to use the expression of one of the witnesses, the "boom busted" and the price of lands within the boundaries of so-called towns dropped suddenly to its legitimate value as farm land. For this state of things, the plaintiff was in no manner responsible, and the defendant should bear the consequence of what *ex post facto* wisdom alone demonstrates was a folly.

The plaintiff's legitimate claim on the note ought not to be delayed in enforcement, and kept in abeyance, until the

defendant, if he is so advised, has his counter claim again submitted to the jury; and judgment must therefore be entered for the plaintiff, as above indicated, with costs of suit; and the costs in respect of the counter-claim and new trial will be left to the discretion of the learned Judge at the trial.

GALT and ROSE, JJ., concurred.

Judgment accordingly.

[CHANCERY DIVISION.]

BEATTY ET AL. V. NEELON ET AL.

Misrepresentation—Action of deceit—Abatement—Death of one defendant—Parties—Locus standi.

The plaintiffs, formerly owners of a line of steamers, brought this action against the defendants, who were formerly owners of another line of steamers, alleging that by certain misrepresentations on the part of the defendants as to certain contracts alleged by them to be held in connection with their line, they, the plaintiffs, were induced to enter into an agreement with the defendants for the amalgamation of the two lines and the formation, in connection with the defendants, of a joint stock company to own and run the same, and seeking damages in respect of such misrepresentations. One of the defendants died after issue joined.

Held, that nevertheless the action could be proceeded with against the surviving defendants.

Held, also, that the action was rightly brought by the present plaintiff, and not by the company.

The bill in this suit, which was brought against Sylvester Neelon, John C. Graham, and George Campbell, filed on February 21st, 1881, stated that before December 29th, 1876, the plaintiffs were the owners of a line of steamboats running from the town of Sarnia to the city of Duluth and Lake Superior and intermediate ports, and that on and prior to the said date, the defendants were the owners of a line of steamboats running from the town of Windsor to

Duluth and intermediate ports: that the steamboats belonging to the plaintiffs were called "The Quebec," "The Ontario," and "The Manitoba," and the steamboats belonging to the defendants were called "The Sovereign," and "The Asia": that on December 29th, 1876, the plaintiffs and the defendants entered into an agreement to form themselves into a Joint Stock Company: that the stock of the company was to be \$250,000, and to be held in shares of \$500 each: that the plaintiffs agreed to transfer to the company their three steamboats and all their interest in any contracts into which they had entered in respect to the said vessels, and all the boats, &c., belonging to the said vessels, and used therewith, and also the office furniture and stationery of the firm of J. H. Beatty & Co., at Sarnia, and that it was agreed that they should receive in paid-up stock in the company as follows, that is to say: James H. Beatty, 211 shares; Henry Beatty, 126 shares; John D. Beatty, 43 shares: that the said Sylvester Neelon had agreed to convey to the said company the steamer "Sovereign," and all the boats, &c., and the said John C. Graham and George Campbell had agreed to transfer to the company the steamer "Asia," and all the boats, &c., and all the good will of the said business carried on by the said Neelon, Graham, and Campbell in connection therewith, and all contracts and connections of them and by them in connection with the Windsor and Lake Superior Line of Steamers, and that they should receive therefor paid up stock of the company as follows: Sylvester Neelon, 40 shares; Graham, 30 shares; Campbell, 30 shares: that the name of the company was to be The North West Transportation Company, and the parties were to become partners until they had procured the charter of incorporation: that before entering into the agreement the plaintiffs and the defendants stated to each other the position of their respective lines of steamboats and the contracts possessed by each: that the plaintiffs stated as the fact was and is, that they had a written contract for carrying Her Majesty's mails for four years from March, 1876,

under which they would receive \$7,000 per annum, and the defendants stated they had a written contract for carrying Her Majesty's mails from Windsor to Duluth, for four years from the spring of 1876, under which they were receiving and would receive during the said four years for each and every trip from Windsor to Duluth, the sum of \$100: that it was agreed that the stock should be distributed between the plaintiffs and the defendants in proportion to the values placed on their respective steamboats, and furniture, &c., connected therewith, and the contracts possessed, and enjoyed by each of the said lines, and the question as to the mail contracts of each of the said lines was considered and was a most material and important element in fixing the respective values as the defendants well knew: that the defendants for the purpose of misleading and deceiving the plaintiffs, and for the purpose of increasing the values to be placed upon their boats, and other property to be contributed by them to the company, falsely and fraudulently represented to the plaintiffs that they, the defendants, had a written contract with the Government of Canada for carrying the mail on their boats from Windsor to Duluth for four years from the spring of 1876, under which they were entitled to receive during the said period for each trip of their boats from Windsor to Duluth the sum of \$100: that the plaintiffs, relying on the said statement and believing it to be true, entered into the said agreement: that the Joint Stock Company was afterwards formed by letters patent of the Dominion of Canada under the name of "The Northwest Transportation Company," dated the 5th of March, 1877: that subsequent to the date of the agreement and before the issuing of the letters patent it was agreed between the plaintiffs and defendants that the stock of the company should consist of 600 shares, of \$500 each, instead of 500 shares as agreed upon, and that the 600 shares should be distributed between them in the proportion in which they were under the said agreement to receive the 500 shares: that the plaintiffs and

defendants were the first directors of the company, and they continued so until about the 5th of March, 1878, when the defendant Campbell ceased to be a director, and thereafter the plaintiffs and the other defendants had continued to be the directors of the company, and the said Neelon was the president of the company: that after the formation of the company and the issuing of the letters patent, and after the defendants had received their stock, the plaintiffs for the first time learned, as the fact was and is, that the defendants had no written or binding mail contract with the Government, as alleged and represented by them, but had merely a verbal agreement with the Government from year to year: that the Government, after the formation of the company, refused to continue the said verbal agreement, or to pay the sum of \$100 per trip, as represented by the defendants, in respect of the said mails, and although the said steamboats entitled thereto have continued to run from Windsor to Duluth the company have wholly lost the said sum of \$100 per trip, whereby the plaintiffs have suffered loss as such shareholders by reason of the said misrepresentations: that at the time of making the said agreement the defendants were under contract with the town of Windsor to run their said steamboats weekly from the town of Windsor to Prince Arthur's Landing, on Lake Superior, and intermediate ports, for a period of three years, of which two had then expired, and under the said contract the defendants were to receive from the town of Windsor therefor at the rate of \$2,000 per annum for each of the said three years: the defendants at and prior to the time of entering into the said agreement stated to the plaintiffs that the said contract was one of the contracts which they would under the said agreement transfer to the said company, and that the company when formed would have the benefit thereof, and it was on the faith of such statements that the agreement was entered into: that the company has since the agreement and during the last of the said three years run one of their said boats weekly from Windsor to

Prince Arthur's Landing and intermediate ports : that the defendants have received the full sum of \$6,000 from the town of Windsor under their contract, and refuse to account therefor, and refuse to transfer to the company the said contract, or the benefit of any portion thereof, and refuse to account in respect of the \$2,000 received for the said third year.

And the plaintiffs submitted the defendants should be ordered to pay such loss and damages as the plaintiffs had sustained by reason of the misrepresentations of the defendants aforesaid, and by reason of the refusal of the defendants to account in respect of the said \$2,000, and their failure to carry out or make good their said representations, on the faith of which the plaintiffs entered into the said agreement.

By their joint and several answer the defendants denied all fraud and misrepresentation ; or, that the plaintiffs were ignorant before signing the contract of the terms upon which they, the defendants, had been carrying the mails ; and they alleged that the plaintiffs had no *locus standi* to complain of any of the matters in the bill mentioned : that the corporation were the proper persons to complain, and they claimed the benefit of this defence, as if they had formally demurred to the bill ; they also claimed the benefit of R. S. O. c. 127, s. 9, and set up other defences not necessary to further mention here.

The case was heard before Wilson, C. J., on the 13th and 14th of May, 1884.

D. McCarthy, Q. C., and *J. H. Macdonald*, with him, for the plaintiffs.

J. Bethune, Q. C., for the defendants, objected that the case should not be proceeded with until the estate of Graham, who died since issue joined, was represented.

McCarthy, contra. This is a proceeding for deceit—for a wrong in which each and all of the parties are wrong-doers. Besides the action has not abated by reason of

Graham's death, but survives. It is not necessary Graham's estate should be represented: *Lloyd v. Dimmack*, 7 Ch. D. 398; *Ashley v. Taylor*, 10 Ch. D. 768; *Seddon v. Cronk*, 10 Sim. 79; *O. J. A.* 1881, Rules 383, 385.

Wilson, C. J., allowed the case to go on against the two surviving defendants.

The case was then proceeded with, and evidence taken.

J. Bethune, Q. C., for the defendants. Even if the case is sustained by the evidence, the proceedings should have been by and in the name of the North-West Transportation Company: *McMurray v. Northern R. W. Co.*, 22 Gr. 476; *Gray v Lewis*, L. R. 8 Ch. at p. 1050; *Macdougall v. Gardiner*, 1 Ch. D. 13, and the company cannot be added now, as the Statute of Limitations is a bar: *Smith v. Chadwick*, 20 Ch. D. 27, shows the grounds upon which relief may be obtained in an action for deceit.

D. McCarthy, Q. C., for the plaintiffs. The bargain was between the three plaintiffs and the three defendants. Whatever was said or done then was wholly between them personally. If deceit or misrepresentation were practised then a cause of action at once arose, and that is the foundation of the present proceeding. If there is responsibility, it lies upon the three defendants individually. The company has nothing to do with the misrepresentation or deceit which took place before the company was formed: *Rawlins v. Wickham*, 3 DeG. & J. 304; *S. C.* 5 Jur. N. S. 278.

September 1st, 1884. WILSON, C. J.—I am of opinion the action well lies as it is brought by the individual partners of the one line against the individual partners of the other line, if the case made out be found to be proved against the defendants.

[The learned Chief Justice then proceeded to consider the evidence adduced and found therein in favour of the

plaintiffs' contention, though with some degree of doubt, giving judgment in their favour for an account, and costs of action.] (a)

A. H. F. L.

[This case has been carried to the Court of Appeal.]

[CHANCERY DIVISION.]

WATERS V. DONNELLY.

Contract—Undue advantage—Inequality between the parties—Rescission.

If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the other by reason of the circumstances mentioned, a transaction resting upon such unconscionable dealing, will not be allowed to stand.

Held, therefore, in the present case, affirming the decision of OSLER, J. A.,—it appearing upon the evidence set out below, that the plaintiff being overmatched and overreached by the defendant, without information and without advice, had made a most improvident exchange of certain real and personal property of his own for certain real and personal property of the defendant—the plaintiff was entitled to have the transaction rescinded; that the plaintiff's general condition of ignorance, his want of skill in business, and his comparative imbecility of intellect, were such as to require the Court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected.

THIS was an action brought by W. H. Waters against G. Donnelly. It appeared that the plaintiff had entered into a written agreement in 1883 with the defendant to exchange certain lands and chattels of his for certain lands

(a) It may be worth noticing that as to the *bonus* of the town of Windsor, the learned Chief Justice held as follows :

“As to the Windsor bonus, I accept the plaintiffs' account of what took place about it during these negotiations, and besides I am of opinion the bonus was granted for the actual yearly service to be performed, and as the plaintiffs did perform that service which they would not otherwise have performed, they are entitled to the benefit of the one-third of it, or \$2,000 for the year 1877.”—RKP.

and chattels belonging to the defendant, and comprising a livery stable and appurtenances. The terms of the agreement, and the circumstances under which it was entered into, sufficiently appear from the judgments. In his pleadings the plaintiff asked merely that the true agreement between himself and the defendant might be enforced, and that the agreement in writing might be declared not to be the true agreement, and that he might be relieved from it. At the trial of the action, however, he asked leave to amend, and to claim to have the agreement rescinded for improvidence, which amendment was allowed.

The writ in the action was issued on February 11th, 1884. The action was tried before Osler, J. A., at St. Catharines, on April 23rd, 1884.

W. N. Miller, for the plaintiff.

McClive and Pattison, for the defendant.

May 27th, 1884. OSLER, J. A.—The action is brought by a man named Waters, who was the owner of a peach orchard in or near Niagara, formerly belonging to his father; and he seems to have been desirous of entering into another business, that, namely, of keeping a livery stable; and the action as it is now framed upon the record, is an action to reform an agreement said to have been entered into between himself and Donnelly, who was the owner of the livery stable in question.

As I said to Mr. Miller at the trial, neither the case as presented originally, nor the evidence as it ultimately shaped itself, admitted of anything like a finding for the plaintiff on the case as shaped upon the pleadings. There was no evidence upon which I could act, such as is recognized and acted upon by either Courts of Law or Equity in dealing with an action of that kind, no evidence upon which I could come to any conclusion as to whether there was in fact any concluded agreement between the parties other than that which appeared to have been reduced to writing. As I said to Mr. Miller, it is impossible for the plaintiff to maintain the case on that ground.

But the evidence shaped itself entirely differently, and I think the parties, to a great extent, put their case on the

ground that under the circumstances the bargain, such as it ultimately turned out to be, was one which a Court of Equity would set aside in view of the position in which the parties stood towards each other, and on the ground that it was a case in which a Court of Equity would act, because an undue advantage had been taken of the plaintiff by the defendant, and on the ground that they were not dealing with each other on equal terms.

Leave was given to amend the pleadings. The parties at the trial were not taken by surprise by the amendment, so that the case comes down to this: whether the evidence will admit of a rescission of the agreement on any such ground as that.

Now the position of the parties has to be looked at. The plaintiff is a man of about twenty-seven or twenty-eight, and there is a great mass of evidence which would lead one to the conclusion that he is very far from being intelligent; not only that he is not a business man, but is a man of a lower degree of intelligence than most men. He is a man whom I should describe as decidedly weak minded and very easily led; coming to that conclusion not only from his examination, but from the evidence of a number of witnesses who spoke of his disposition. He would seem to be a man who, when he once had set his mind on anything, without forming any judgment as to the propriety of the course which he desired to take, or considering the value of that which he desired to get, would be very easily induced to do anything in order to get it. The defendant, on the other hand, is a man who, I should say from his appearance and manner in the box, is rather above the average of the capacity of business men, and I should call him a remarkable shrewd intelligent man. I do not mean for a moment to suggest, nor do I think he is a man who would deliberately and wilfully take any advantage of his neighbour, but still he is a man with whom the plaintiff would be by no means on equal terms. While the plaintiff cannot be described as imbecile, he would be very much like wax in the hands of a man like the defendant. I do not think that is an unfair description of the relative ability of the two parties.

Now that being their relative capacity, how does the agreement which was afterwards entered into, come to be brought about?

The first time the two parties seem to have come together was an occasion when the plaintiff desired to

borrow \$200 from the defendant. The defendant did not want to lend it, and a conversation seems to have proceeded between them, in which a suggestion was made (I do not know on whose part the suggestion came, but I rather think it proceeded from the plaintiff), a suggestion that the defendant should buy the plaintiff's peach orchard, and the plaintiff should take over the defendant's livery stable. The defendant held back. Whether he did so for a purpose, or whether he did not really want to dispose of his livery business, I do not say. But at all events he declined to enter into any bargain with the plaintiff, and would not at first negotiate with him at all about it. Then the plaintiff seems to have applied to a man named Secord, and also to Hutchinson, to try to negotiate with the defendant to effect this exchange, and the plaintiff went so far as to promise Hutchinson a commission of \$100 if he could induce the defendant to enter into a bargain with him. Hutchinson, I should say, had a mortgage of \$800 on the plaintiff's premises. Hutchinson and Secord, on different occasions, both saw the defendant, and the result was that an interview was brought about between them, and a memorandum drawn up. They met at Secord's office. Secord was a sort of conveyancer and half lawyer and commissioner, and he seems occasionally to have acted for the plaintiff's father in his business, among other things drawing his will. Such as he was, he was the only legal adviser the plaintiff had, and I cannot say from anything I saw in the course of the trial that he either did attempt to advise the plaintiff as a professional man would have advised him, or even as a friend would have advised him. Nor do I think from the terms he was on with Donnelly, that Secord would have interfered with any bargain that Donnelly might have desired to effect. They met at Secord's office, and there, after some conversation, a memorandum was prepared, not a written agreement, and not intended to be a final agreement. The plaintiff valued his premises, and I do not think, from the evidence, overvalued them. He placed a fair value upon them, that is to say \$7000, which was a fair value of the property according to the evidence. According to Secord's evidence and Donnelly's too, Donnelly was determined, no matter what the plaintiff's property was worth, to have \$700 to boot in the exchange, and he says he told the plaintiff so. The plaintiff's notion was, that the two properties were of the same value, but, Donnelly was determined to have the \$700 more.

At this meeting the memorandum was drawn up. Waters's real estate and chattels were valued at \$7,000. Donnelly's real estate consisted of three-quarters of an acre in the town, on which was a livery stable, and there was a quantity of property suitable for that business, viz., carriages, horses, sleighs, a hearse, omnibusses, &c. He valued the real estate at \$4,000, and the others at various sums (set opposite to them in exhibit 8), the whole valued at \$7,370; and below that there is an item of good-will \$330; so that valuing Donnelly's property at \$7,370, and the good-will at \$330, that makes up the difference of \$700, which the defendant required to have to boot in the exchange. There never was, and it is not pretended that there was any independent valuation or any attempt on the part of the plaintiff to procure a valuation of Donnelly's property, nor is there any suggestion that the plaintiff was a man who could form an opinion of the value of Donnelly's property. All that happened in regard to valuation was, that Donnelly put the figures down, and made up a valuation of \$370 more than Waters placed on his property; and the plaintiff added to that valuation a sum of \$330 for the good-will. On the back of the memorandum, Exhibit 8, there is this: "Donnelly and W. H. Waters agree to exchange properties; Donnelly's property and chattels to be taken by Waters at \$7,370; Water's real estate and chattels at \$7,000; Donnelly to get \$330 for good-will of his business, and to lend Waters \$300 and pay Hutchinson's mortgage. Waters to give Donnelly a mortgage for balance, interest at 9 per cent." The parties did not sign that then, and this memorandum, Exhibit 8, was given to Waters, that he might show it to his wife.

Speaking then of the values of the property, I do not think Donnelly's property was worth any thing like \$7,000, looking at the sort of property it was, and what it was used for, although it may have been the only property of its kind in the town.

Mr. *Miller*—No, my Lord. There was another livery stable there.

His LORDSHIP—Well, looking at it altogether, I have come to the conclusion that there was at the very lowest a difference of \$2,000, perhaps as much as \$2,300, between the two properties. It is impossible for me to accept the evidence of Hinnigan, the bailiff, who swears these figures,

or figures very like these, were figures which this property would bring at a bailiff's sale. I think it is quite impossible to believe the bailiff. Property of this sort would not bring anything like those prices at a bailiff's sale, especially in a place where there was not likely to be much competition.

That being the position of things, they went next day to St. Catharines, Secord meeting them there or going with them. In St. Catharines they met in Mr. McClive's office. Secord, Donnelly, Waters, and, I think, another person were present, and there an agreement was drawn up which is in the defendant's statement of defence. That agreement, on looking at it, is certainly not such an agreement as any one taking this memorandum, Exhibit 8, would ever have dreamt of drawing out from it. It would not be possible to draw such an agreement from this Exhibit 8. As I read Exhibit 8 it may be capable of other explanation, but as I read it it indicates clearly enough that as part of the agreement between the parties, Donnelly was to pay off Hutchinson's mortgage; so that agreement also says. But as I also understand them, it was merely to be paid off by way of loan. I do not know that the plaintiff understood that was the agreement of the previous evening. The agreement as drawn up the next day ends in the plaintiff executing a mortgage to Donnelly for \$2,029.

Now, there is nothing in this agreement, Exhibit 8, which says Waters was to buy any more property, and throw it into the property which Donnelly and he were bargaining about on the previous evening, but in the agreement drawn up on the following day, it appears Waters was to procure some other lots which belonged to his sisters, and throw that in with the real estate already valued at \$7,000. This mortgage is drawn for \$2,029, made up in this way: difference between the values of the properties \$700, advance of \$300 as arranged for in Exhibit 8, Hutchinson's mortgage \$800, which as this agreement is ultimately drawn up, although Exhibit 8 provides for its payment by Donnelly, is nevertheless to be paid back by Waters to Donnelly, and Waters has to give Donnelly a mortgage to secure him for the payment of it, and a further sum of \$250, an advance made by Donnelly to buy these other two lots, making in all \$2,050, the difference between that sum and the \$2,029 being explained by the omission of some small item.

That is the way the agreement was ultimately carried out. There was nothing more in the agreement drawn in Mr. McClive's office, and I have nothing beyond general information as to what occurred in Mr. Clive's office, Mr. Clive who was counsel in the case not himself giving evidence in the matter. The agreement, it is said, was there read over to the plaintiff, and it is said he understood it. I take leave to doubt that very much. It seems to me very improbable that such an agreement as that, drawn up in the terms in which it is, could be recognized very readily by a man of the plaintiff's intelligence as implementing the memorandum of the previous evening. Secord was there, but it is quite improbable that he either did advise or was a man capable of advising Waters. He ultimately drew up the documents which were provided for by this agreement, not at that time and place but shortly afterwards. On the whole, I think, Secord did not go further than to say he drew up the documents, and did not advise him.

When the papers were signed, it is said, but I do not know that I place reliance upon that, there is no evidence that they were not read over to Waters, but I do not make any special finding on that. I think it is quite possible and likely they were read over when they were signed.

Now, I think that is upon the whole a statement of the principal facts upon which the case must turn. At the trial I felt disposed to give less weight than I think I am obliged to by a subsequent examination of the authorities to the difference in the position of the plaintiff and defendant, and some of the facts, on reflection, have struck me as having a rather more important bearing than I was disposed to attribute to them before I had more fully considered the case.

There is no doubt of the existence of material difference between the values of the two properties, an inadequacy of consideration. That alone is not to be taken into consideration, and that alone will not suffice to avoid a transaction between the parties. Courts do not exist to protect people against foolish bargains, and unless the inadequacy of consideration is so gross, unless the disparity is so gross, as Lord Brougham has somewhere described it, as to be heard of with uplifted hands and exclamations of astonishment, it is not a ground upon which Courts of Equity can interfere. Nevertheless, it is evidence, and it is to be looked at in cases where the question of the equality of

position between parties is to be taken into consideration, and where an undue advantage has been taken by one party of another. Where it exists in connection also with a weakness of mind on the part of the person who complains of the bargain, these two circumstances taken together form rather a strong ground for the interference of the Court. It strikes me as rather remarkable that the plaintiff was so extremely anxious to exchange this property of his and acquire a livery stable, which he did not know anything about managing, that he was prepared to allow any valuation to be placed by Donnelly on his property. He accepted without demur the valuation which was placed on Donnelly's property. So long as Donnelly got \$700 to boot he did not care what valuation was placed on the properties. That seems to be an indication that the plaintiff was a man who was not on equal terms with Donnelly mentally. He accepts the defendant's mode of arriving at the valuation and at the difference, and besides he is willing to pay Hutchinson a commission of \$100 for all this.

And then we have the fact that, he being a man of the character I have described, the agreement is entered into without any independent advice on his part, or without his having any solicitor. A solicitor would probably have called his attention to the fact that this agreement, Exhibit 8, provided that Donnelly was to pay off the Hutchinson mortgage, and it would have struck him at once as remarkable if Waters had been asked to give a mortgage to Donnelly to include the land which Donnelly had agreed to buy.

Then in the agreement a part of the consideration Donnelly demands is \$330 for the good will of the livery business. In the final agreement between the parties there should have been some stipulation in regard to Donnelly not going into a similar business again, but there is nothing of that kind inserted in the agreement, and no notice is taken of the fact that Donnelly is really selling his good will.

The whole transaction appears to bear the appearance of improvidence, and while I absolve Donnelly of any imputation of fraud, intentional fraud, I think the parties were in that position towards each other that a Court of Equity, looking at the plaintiff's mental disposition, and the difference between the values of these properties, would say an undue advantage had been taken of one by the other in the transaction.

That leads me to the conclusion that the plaintiff makes out a case for relief in a Court of Equity, and the main question now is, as to the terms upon which that relief should be allowed.

No doubt Donnelly must be placed in the same position, as far as possible, as he was before the transaction; both parties must be placed in the same position, as far as possible, as at the time the agreement was entered into, and Donnelly must have a lien upon the property he has acquired from the plaintiff for all moneys he has advanced and interest thereon; and also for such improvements as he has actually made upon the land which he bought from the plaintiff, not including any improvements he has made on property adjoining to his own. I understand from the evidence he has not paid the Hutchinson mortgage; he has merely paid the interest on it. He lent the plaintiff \$300 under the terms of this agreement; for that he is entitled to a lien; and he also advanced \$250 to buy these Baxter lots. I think that may be left in this way: he may either retain those lots or he may convey them to the plaintiff, and have a lien on the plaintiff's property, and on them of course, for the amount which was paid and interest. With regard to the livery stable, that must be conveyed by Waters to Donnelly, and the parties must execute mutual re-conveyances; and Donnelly is entitled to have an account taken, if the parties cannot agree, of the profits derived by the plaintiff from the use of his property since he acquired it; so, on the other hand, if Donnelly has derived any advantage from the use of the plaintiff's property he must account for it. There must be mutual accounts in that respect.

I might have referred perhaps, in dealing with the values, to the fact that Donnelly seemed to have very great difficulty in saying what the value of the livery stable was, or what income he derived from it. He said he lived out of it, and that is about all he said.

That is what strikes me at present as the relief to which the parties are entitled.

If there is anything else which would appear proper to deal with, the parties may bring it up when speaking to the minutes.

As to costs. If I had dismissed the action, as I rather at one time was inclined to do, I should have dismissed it without costs, on the ground that the defendant had got an extremely good bargain, and the plaintiff had not been

advised properly with reference to it. I doubted whether the position of the parties was such that I could act as I have felt myself obliged ultimately to act. In the same way, not finding there is any actual fraud on Donnelly's part, that he has simply got a good bargain, I should, at the instance of the plaintiff, who is seeking to undo what has been done, in asking a Court of Equity to help him, under these circumstances simply make the decree, without costs to the plaintiff.

On September 4th, 1884, the defendant appealed to the Divisional Court.

McClive, for the defendant. We admit that the parties were not mentally equal, but deny that there was such a discrepancy in the values of the properties exchanged as to show improvidence. The plaintiff was not mentally defective, he was simply not a man of business, which the defendant was. The parties were not friendly, or not so much so that there was any power of the one over the other. Moreover, the plaintiff has had the use of the livery stable for eleven months. We refer to *Kerr on Fraud*, 2nd Ed., p. 158; *Pries v. Coke*, L. R. 6 Ch. 645; *Tate v. Williamson*, L. R. 2 Ch. 55; *Summers v. Griffiths*, 35 Beav. 27; *Cockell v. Taylor*, 15 Beav. 103; *Smith v. Kay*, 7 H. L. Cas. 750; *Wood v. Abrey*, 4 Madd. 417; *Clark v. Malpas*, 4 De G. F. & J. 401; *Baker v. Monk*, De G. J. & S. 388; *Harrison v. Guest*, 6 De G. M. & G. 424; S. C. in App. 8 H. L. Cas. 481; *Curson v. Belworthy*, 3 H. L. Cas. 742; *McDiarmid v. McDiarmid*, 3 Bli. N. S. 374; *Morse v. Royal*, 12 Ves. 355; *Fallon v. Keenan*, 12 Gr. 388; *Brady v. Keenan*, 14 Gr. 214.

W. N. Miller, for the plaintiff. The plaintiff was mentally defective, and the defendant, who was a very shrewd business man, had known him from his boyhood. If the parties were not of equal capacity, the agreement cannot stand, if any advantage was gained. I refer to *Kerr on Frauds*, 2nd Ed., p. 161, 2; *Lavin v. Lavin*, 7 O. R. at p. 107; *Widdifield v. Simons*, 1 O. R. 483; *Maitland v. Irving*, 15 Sim. 437; *McEwan v. Milne*, 5 O. R. 100;

Mason v. Siney, 11 Gr. 447 ; *Longmate v. Ledger*, 2 Giff. 157 ; *Gough v. Bench*, 6 O. R. 699 ; *Harrison v. Guest*, 6 De G. M. & G. 424.

December 18th, 1884. BOYD, C.—There is an important decision in 1876, by Sir Edward Sullivan, then M. R., and now Lord Chancellor of Ireland, which was affirmed by the Court of Appeal, and in which he thus defines the law applicable to this case : “ I take the law of the Court to be, that if two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the other by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand ; and there are several cases which shew, even where no confidential relationship exists, that where parties were not on equal terms, the party who gets a benefit cannot hold it without proving that everything has been right and fair and reasonable on his part :” *Slator v. Nolan*, Ir. R. 11 Eq. 386.

The method of investigation is to determine first whether the parties were on equal terms, if not, and the transaction is one of purchase, and any matters requiring explanation arise, then it lies on the purchaser to shew affirmatively that the price given was the value. That is to be deduced from *Baker v. Monk* 4 DeG. J. & S. 388, cited by Sir Edward Sullivan, and in *Baker v. Monk*, Turner, L. J. refers to *Evans v. Llewellyn*, 1 Cox 333, as laying down the principle on which the Court acts in cases of purchases, and quotes from the judgment of the M. R. in that early case as saying, “ though there was no actual fraud, it is something like fraud, for an undue advantage was taken of the vendor’s situation,” and then Turner, L. J., proceeds to eliminate moral fraud on the part of the purchaser in *Baker v. Monk*, but says that it is enough if the

parties are not on equal terms, that an unprovident contract has been entered into, in order to invoke the protection of the Court. "*Fraud*" is the term sometimes applied to characterize the conduct which the Court reprehends in this class of cases, but "fraud" so used need not mean deceit or circumvention, it may mean an unconscientious use of the power possessed by one of the parties, arising out of their relative position or condition, as pointed out by Lord Selborne in *Aylesford v. Morris*, L. R. 8 Ch. 490.

Lord Selborne there further elucidates the doctrine of the Court by saying that if the parties meet under such circumstances as in the particular transaction to give the stronger party dominion over the weaker, then the principle is applied of requiring the one who gets the benefit to prove that the transaction was fair, just, and reasonable. These authorities are all cited in *Slater v. Nolan*, and they supply the principles of law which will determine the present appeal. Upon one of the main elements of fact in the case, the Judge who heard and saw the witnesses has decided that the parties were not dealing on equal terms, and I agree with his conclusion that Waters from natural incapacity was far from being on a par with Donnelly in negotiating for the sale and exchange of the property in question.

Upon another of the main questions of fact the Judge has found that there was a great disproportion in value between what Waters gave and what he received. The whole profit of the transaction, and that in large measure remained with Donnelly.

A careful consideration of the evidence discloses that Donnelly first approached Waters by suggesting to him that he could make an easy living out of the business; he visited him on several occasions and represented that the livery place was the one that he, Waters, ought to have. He played successfully upon Waters's weakness, and incited a strong desire on the part of the plaintiff to become proprietor of the livery establishment on any terms. Some of the witnesses describe Waters as "a man who could be led into a bargain if he took a notion of the thing." The

defendant's long training in the livery business would not be likely to dull his wits, and he is described even by friendly witnesses as a very shrewd, keen, business man. Indeed nothing could better exemplify that aspect of his character than his conduct of this transaction.

There was at the outset an assumed reluctance on Donnelly's part to come to terms with Waters. This led Waters to ask the aid of Mr. Secord, a local conveyancer, and Mr. Hutchinson, who had a mortgage for \$800 on the plaintiff's property. These persons interviewed Donnelly about exchanging properties with Waters, but he at first refused, and then suddenly sent a message that Waters should meet him at Long's hotel. At this meeting, on the 9th of March, 1883, Donnelly asked Waters to put down what he asked for his place, and that he would put down what he wanted for his. (Before this, Waters and his wife swear, and it is not contradicted, that Donnelly said Waters's place was worth \$8000, and his, Donnelly's, was worth \$5,000). At Long's hotel Secord was present and acted as recording clerk. He took down at Waters's dictation the value of his real estate and some chattels which went therewith at \$7,000, and then he took down at Donnelly's dictation his land at \$4,000 and a list of the livery properties in detail at \$3,370, and \$330 for good will. Waters did not go to see these chattels, and accepted the figures that Donnelly gave without inquiry. He spoke on one occasion, before the trade, of having a valuation, but Secord said that there was no need of that as Donnelly was willing to give him (Waters) his price. Waters also says that Secord advised him to trade, and there is no contradiction of that. According to Secord the whole of this performance at Long's was a farce, because Donnelly said that night when they were all present: "It does not matter what you put down the properties at, I am bound to have \$700 over and above," *i. e.*, by way of boot. According to Secord's memorandum the bargain was closed that night on the following terms :

"Donnelly and Waters agree to exchange property. Donnelly's property and chattels as within to be taken by Waters at \$7,370, Waters's real estate and chattels at \$7,000. Donnelly to get \$330 for good-will of business, and to lend Waters \$300 and to pay Hutchinson's mortgage. Waters to give Donnelly mortgage for balance: interest at nine per cent.

Secord says that he was not acting for Waters that night, and he interposed no word of advice, or suggestion, or caution, though he knew the disparity of the parties who were dealing, and though he must have known the disparity in the values of their respective properties. Hutchinson was if possible more neutral; he rejected the idea of advising Waters and told him he would have to make his own terms with Donnelly. It is difficult to discern what consideration Waters received for the \$100 which he paid Hutchinson out of the loan from Donnelly. Waters promised this sum to Hutchinson if he would aid in inducing Donnelly to carry out the exchange, and this promise and this payment afford very striking collateral illustrations of the infatuation which controlled Waters throughout the transaction.

Donnelly gave Secord's memorandum to Waters, and told him to take it home and look it over, and if the terms they had figured on suited him that he was to come next day, and they would go to St. Catharines and have it carried out in writing. Before Donnelly was out of bed on the 10th Waters came and they proceeded to St. Catharines, and there a formal written agreement was drawn up by Mr. McClive (a), and signed by both parties. It is alleged that Secord acted on this occasion for Waters, as the defence puts it, "with zeal and good judgment." But his acting was simply to get abstracts of title and affidavits to draw the conveyances, and he in no manner advised or protected the plaintiff in the slightest degree. The competition was still between Donnelly, aided by his

(a) Mr. McClive was a lawyer practising at St. Catharines.

solicitor, and the plaintiff, unaided by any one. No reflection is cast or is sought to be cast on the conduct of Mr. McClive. His business was simply to express formally what Secord had jotted down informally—he knowing nothing about the merits or demerits of their dealing.

The parties then returned to Niagara, and the same night the conveyances, &c., are executed—read over, it is said, to the plaintiff, but not read over or explained to his wife.

So far as the values are concerned it is enough to say that one of the defendant's own witnesses valued the land, which was put down at \$4,000 in the trade, as being worth from \$1,200 to \$1,400; and as to the chattels, a hearse put down as worth \$450, was admitted by Donnelly to have cost him not more than \$220 some time before.

A very noticeable feature of the affair is, that there is no reasonable or satisfactory explanation sufficient to inform the plaintiff of the various changes by which the mortgage that is to be given by the plaintiff (according to the original memorandum) for the sum of \$1,000 is worked up in the mortgage itself, dated 12th March, 1883, to the sum of \$2,029. I have been unable to understand this properly, and I am quite sure that it must have been a mystery to the plaintiff. The obvious meaning of Secord's memorandum is, that the defendant was to assume and pay Mr. Hutchinson's mortgage of \$800 on the plaintiff's place. But Donnelly and his witnesses say that is not what was intended. He, Donnelly, was to pay it in the first place, but was to have a new mortgage for that and the \$1,000. That view of the transaction is expressed in McClive's agreement, though not in such a way as to bring the matter home to the plaintiff, unless special pains had been taken to explain it to him; because, as one of the witnesses said, "a mortgage might be read to him in any shape or form without his knowing the difference."

McClive's agreement is thus drawn: "Said Donnelly to pay a mortgage, now on said premises, of \$800, any excess to be paid by said Waters, and said Waters is to give upon

the lands and premises and chattels he is acquiring from said Donnelly, a mortgage of \$1,800 to be a first lien," &c.

It then continues as follows: "The said Waters is about buying lots 411 and 412 from his sister, Isabella Baxter, and is to convey same, when purchased, to said Donnelly, who, by the consideration herein expressed, has already paid for same; but if said Waters does not succeed in purchasing and procuring from his sister the said lots he is to pay said Donnelly the sum of \$250 as the value of the same, said sum of \$250 to be added to above mortgage of \$1,800 to be given said Donnelly by said Waters, and to be payable at same time and upon same terms." According to McClive's agreement the mortgage was to be for \$1,800, and if default was made in procuring the two lots for Donnelly that mortgage was to have \$250 added to it. But Waters did procure and convey these two lots to Donnelly on the 13th of March, 1883, and the mortgage should not have been drawn for more than \$1,800. There is next a singular writing, prepared by Secord, signed by Waters, and dated 16th of May, 1883, the recitals of which contradict McClive's agreement by setting forth that Donnelly was to allow \$250 to be endorsed as paid on the mortgage for \$2,029 upon Waters purchasing and conveying the two lots. That writing then acknowledges an advance of \$250 from Donnelly to Waters, which Waters agrees may be charged upon the mortgage so as to keep it at \$2,029. While this manner of dealing would probably effectually befog Waters, the practical result to Donnelly is, that he gets 9 per cent. interest on \$250 from 12th of March, 1883, which he did not advance till the 16th of May thereafter.

The short result of the whole is, that Waters was overmatched and overreached; without information, and without advice he made a most improvident exchange; his general condition of ignorance, his want of skill in business and his comparative inbecility of intellect, are such as to require the Court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected.

In my opinion the judgment was right as well as righteous, and should be affirmed, with costs.

PROUDFOOT, J.—I agree with some hesitation in the affirmance of this judgment. There is evidence from which it might have been established that the plaintiff though not a person of strong mind, was by no means incompetent to manage his affairs; that the defendant occupied no fiduciary relation with regard to him; that the plaintiff began the negotiations for the exchange of properties; that the defendant insisted from the beginning that in the transaction he should have \$700 *to boot*, so that it was immaterial what value was placed on the items comprising the defendant's property; that the defendant was not without counsellors in the transaction, his wife, his friends, his sisters, were all cognizant of the transaction, his sisters indeed selling their interest in some of the property to enable him to carry out the bargain, and he had the assistance of Secord, a man of business.

The law does not require parties to a contract to be of equal mental capacity; if it did no contract could stand. All it requires, is that one side should not obtain a benefit by fraudulent means.

On the other hand there is evidence which, according as the Judge credited it, might lead him to a different conclusion on some if not all of these matters. He heard the witnesses and was better able than we can be to judge of the value of their evidence. Upon this ground I think it would not be safe for us to reverse his judgment.

FERGUSON, J.—The learned Judge before whom the action was tried, speaking of the plaintiff, says: "There is a great mass of evidence which would lead one to the conclusion that he is very far from being intelligent, not only that he is not a business man, but is a man of a lower degree of intelligence than most men. He is a man whom I should describe as decidedly weak-minded and very easily led; coming to that conclusion not only from his

examination, but from the evidence of a number of witnesses who spoke of his disposition." He further says: "He would seem to be a man who, when he once had set his mind on anything, without forming any judgment as to the propriety of the course which he desired to take, or considering the value of that which he desired to get, would be very easily induced to do anything in order to get it."

As to the defendant the learned Judge expressed the opinion that he is a remarkably shrewd, intelligent man, and he bases this opinion, at least in part, upon the appearance of the defendant in the witness box; and he says that the defendant is a man with whom the plaintiff would be by no means on equal terms, and that while the plaintiff cannot be described as imbecile, yet he would be very much like wax in the hands of a man like the defendant. As to the values of the respective properties that were exchanged, the learned Judge says that he does not think the plaintiff over valued his property when he placed the value at \$7,000. He says that this was a fair value according to the evidence, while he says that he does not think that the defendant's property was worth anything like \$7,000, and his conclusion is that there was, at the very lowest, a difference of \$2,000, or perhaps as much as \$2,300 between the properties.

A good many of the witnesses say that the plaintiff is capable of transacting business. The witnesses, however, who had the best opportunity of knowing him, and who apparently knew him best, speak of him much as the learned Judge has done. The evidence in regard to the values of the respective properties is conflicting. It is, necessarily (for the most part at all events) matter of opinion, and there appears to have been much difference of opinion amongst the witnesses, if it is assumed that they all spoke honestly.

After perusing the whole of the evidence with as much care as I have been able, I am not prepared to say that I think the findings in these respects of the learned Judge,

or any of them, are wrong. On the contrary, I am quite disposed to agree with him; and I also agree with him in the opinion that the transaction was, on the part of the plaintiff, an improvident one. I feel called upon to say, however, that when the learned Judge said that he entirely absolved the defendant from any imputation of intentional fraud, he must have given him the benefit of every circumstance making in his favour, and that upon the evidence I would not be so clearly of this opinion.

The law which I think applicable to a case of this sort appears to be clearly and briefly stated in a case mentioned by the Chancellor, *Slater v. Nolan*, Ir. R. 11 Eq. 386, by the Master of the Rolls, and the decision was afterwards affirmed in appeal.

The learned Judge said:—"If two persons, no matter whether a confidential relation exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts show that one party has taken undue advantage of the other by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand; and there are several cases to show, even where no confidential relation exists, that where the parties are not on equal terms, the party who gets a benefit cannot hold it without proving that everything has been right, and fair, and reasonable on his part."

This decision does not, I think, lay down any *new* law but rather appears to state concisely what the law was and is. I think the defendant here has not proved, nor does it, I think, appear that everything was right, and fair, and reasonable on his part. The transaction must have been known to him to have been an improvident one on the part of the plaintiff, who had no proper advice in regard to it. On the evidence and the findings of the learned Judge I think it apparent that he knew he was getting a large advantage of the plaintiff. The transaction in the form that it ultimately took was to a man of the plaintiff's under-

standing a complicated one, and one in which proper independent advice was necessary, and no such advice was obtained. The manner in which the defendant placed the values on his parcels of property (when the figures were taken down by Secord) in order apparently to bring the total sum up to something like the sum mentioned as the value of the plaintiff's property, and the fact that there was no valuation or investigation as to the kind or value of the various items of personal property of the defendant to which such large values were attached, and that there was no investigation as to the profits that had arisen from the defendant's business, as well as some other things that might be mentioned, seem to me to indicate that the plaintiff was dealing *recklessly*, and this to the knowledge of the defendant, and it appears, I think, that an undue advantage was taken of him. Then assuming that the opinion of the learned Judge as to the respective mental capacity of the parties is correct, and as I have already said I think it is, I am of the opinion that the transaction cannot be allowed to stand, and that the judgment is right and should be affirmed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

GRANT ET AL V. LA BANQUE NATIONALE.

Banks and banking—Pledge of timber limits to bank—Security for future advances—Invalid mortgage—Party entitled absolutely, voluntarily restricting his claim to a lien—Judgment—Quebec regulations as to timber on Crown lands—34 Vic. ch. 5 D. secs. 40, 41—Parties—The Crown—Locus standi.

Section 28 of the revised regulations respecting the sale and management of timber on Crown lands in Quebec provides that "limit holders, in order to enable them to obtain advances necessary for their operations, shall have a right to pledge their limits as security without a bonus becoming payable," and it further provides that "if the party giving such pledge shall fail to perform his obligations towards his creditors, the latter * * may obtain the next renewal in his or their own name subject to payment of the bonus, the transfer being then deemed complete." In 1875 and 1876 one F., who was now represented by the plaintiffs, procured for the purpose of his business operations as a lumberman, certain pecuniary advances from the defendants, the National Bank, through B., their local manager, and to secure repayment, gave to the defendants certain promissory notes and valuable securities, and as collateral security also gave a written pledge dated September 21st, 1876, of certain timber limits in Quebec, which pledge purported on its face to be "for advances made and to be made" to him. In 1877, with the consent of B., F. cancelled this supposed pledge, and gave what purported to be a new pledge of the licenses to the National Bank, which simply stated that he thereby pledged all his rights, titles, and interests in the licenses to the defendants, and which new pledge was indorsed on subsequent renewals of the licenses. The defendants did not at any time bind themselves to make any further advances to F., but as a matter of fact in 1877, 1878, and 1879, F. continued to receive advances from the defendants. In 1882, F. being still indebted to them in a large sum, and the pledge of the timber limits still in force, the defendants, pursuant to the above section of the regulations, obtained an issue of the licenses directly to themselves. The plaintiffs now brought this action for discovery of the securities held by the defendants on account of F.'s indebtedness, and for redemption, and for a declaration that the defendants had no lien on the timber limits in question.

Held, that as to the advances made before the pledge was given the security was valid, but that as to the future advances, the pledge of the timber limits was invalid as being in contravention of 34 Vic. ch. 5 D. sec. 40.

Held, however, that inasmuch as the defendants, although they had obtained the issue of the licenses directly to themselves, and thus procured a complete title to the property, under the above section of the regulations, nevertheless voluntarily restricted their claim to a lien upon it for the whole amount of F.'s indebtedness, they were entitled to judgment declaring such lien, and that on payment of such indebtedness the defendants should convey the property to the plaintiffs.

Held, further, that it was open to the plaintiff in this action to object to the transaction as contravening the Banking Acts, and it was not necessary for the purpose of such objection that the proceedings should be by the Crown.

Semble, that if a mortgage upon lands be given to a bank as security for future advances in contravention of the Banking Acts, and after the debt has been contracted or advances made, another mortgage be executed upon the same property as additional security for the debt so contracted or advances made, the second mortgage will be valid.

THIS was an action brought by Allan Grant and J. P. Millar, against La Banque Nationale for discovery of the securities held by the defendants on account of the indebtedness, if any, of one Frazer (of whom the plaintiffs were the assignees) to them, and redemption, and for a declaration that on certain timber limits in Lower Canada the defendants had no lien.

The facts are fully set out in the judgment.

T. S. Plumb, for the plaintiffs. Under sec. 28 of the regulations, the limit-holder could not create any lien on the limits for money advanced in the then past. I refer to *Maxwell* on Stat. pp. 2-4. As to future advances, the pledge would have been good had it not been made to a bank; but being made to a bank it is in contravention of the Banking Act of 1871, 34 Vic. c. 5. D. secs. 40, 41, 42, 43, 44, 46, 47; 43 Vic. c. 22, sec. 7; *Royal Canadian Bank v. Cummer*, 15 Gr. 627; *Commercial Bank v. Bank of Upper Canada*, 7 Gr. 250, 423.

Marsh, for the defendants. The pledge was not of "lands and tenements": *McGregor v. McNeil*, 23 C. P. 538; *Marshall v. Green*, 1 C. P. D. 35. The case comes within 34 Vic. c. 5, sec. 41. I rely on the two cases cited above by the plaintiff. Moreover it does not lie in the mouth of the plaintiff to say the pledge is not good. A stockholder might restrain the Bank from doing the wrongful act, or, if the act had been done, the Crown might take proceedings by *sci. fa.* to repeal the Bank's charter: *National Bank v. Matthews*, 98 U. S. S. C. 621; *Brice on Ultra Vires*, 2nd ed. p. 73; *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548; *Smith v. The Merchants' Bank*, 28 Gr. 629, 8 A. R. 15, 8 S. C. R. 512; *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. 696; *Morawetz on Corp.*, sec. 46, 47, 116-118; *Re Coltman*,

Coltman v. Coltman, 19 Ch. D. 64. As to sec. 28 of the Regulations of Quebec the point of the section is the matter of the bonus. The bonus is something in which the Department only are concerned, and the plaintiffs cannot complain as to it. The regulations are matter of internal economy in the Department. On this part of the case I refer to *Ex parte Stewart—re Shelley*, 11 Jur. N. S. 25; *Ex parte Littledale*, DeG. M. & G. 714; *ex parte Pooley*, 2 M. D. & DeG. 505; *Ex parte Dobson*, *ib.*, 685; *Ex parte Masterman*, 2 M. & A. 209. Besides the license issued to the Bank had the effect of passing the title, and that title cannot be taken from them without paying what, if anything, is owing to them: *Skae v. Chapman*, 21 Gr. 534; *Kay v. Wilson*, 24 Gr. 212; *Dougall v. Dougall*, 26 Gr. 401; *Yorkshire Railway Wagon Co. v. Maclure*, 19 Ch. D. 478.

T. S. Plumb, in reply. The feature that distinguishes this case from *Commercial Bank v. Bank of Upper Canada*, 7 Gr. 250, 423, is that the whole here was one transaction. The matter of the validity or not can be litigated between the parties. The case just cited and *Royal Canadian Bank v. Cummer*, 15 Gr. 627, shew this. *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548, is clearly distinguishable, see at p. 599. The sections in *Morawetz* refer to ratification by the company of its own acts. As to the grant of 1882 this is not in the nature of a fresh security; but it is in the nature of a foreclosure. It was not for past advances, but only a foreclosure of the past pledge.

March 7th, 1885. FERGUSON, J.—The plaintiffs are assignees of one Frazer. The action is for discovery of the securities held by the defendants, an account of the indebtedness, if any, of Frazer to the defendants, redemption of the securities if anything is found due, payment to the plaintiffs if it is found that the defendants have been overpaid, and for a declaration that upon certain timber limits in Lower Canada there is no lien in favour of the defendants.

The parties by their counsel have agreed upon a reference to the Master at Ottawa, and to the terms of the same, with the exception of one question, which is as to whether or not the defendants hold any lien upon the timber limits above mentioned. It was agreed that this was the only question to be determined by me, and that so far as it might become necessary to put an interpretation upon certain regulations of the Crown Land Department of the Province of Quebec I should be at liberty to do so without any expert evidence being given. The case comes before me upon admissions made by each party, which admissions are in writing. The defendants admit the first, second, third, and fifth paragraphs of the plaintiffs' statement of claim. The plaintiffs admit the first, second (save as to the pecuniary amounts), third (save as to the pecuniary amounts), fifth, sixth (save as to cutting), and eighth (save as to the word "sole") paragraphs of the defendants' statement of defence to the plaintiffs' original statement of claim. It is also admitted in effect, I think, and the case was argued on the footing (although the admission paper is by no means clear on the subject) that the defendants only claim to hold the limits in question as mortgagees thereof or lien holders thereon. There are other agreements or admissions that will be referred to hereafter if necessary. In order to state what the admissions, made by reference to the paragraphs of the statements of claim and defence, are it will be convenient, though somewhat verbose, to set forth in effect the paragraphs referred to so far as they are admitted.

The defendants admit that the plaintiffs are lumbermen and reside in the city of Ottawa, and that the defendants are a chartered bank carrying on a general banking business in the Provinces of Ontario and Quebec, and have an agency or Branch in Ottawa, with and through which the transactions respecting the limits in question were entered into and conducted.

2. That during the years 1875 and 1876 one Allan Frazer of Ottawa, lumberman, procured for the purposes of his

business operations certain pecuniary advances from the Ottawa agency of the defendants through their manager, Samuel Benoit, and to insure the repayment thereof Frazer gave to Benoit, acting for and on behalf of the defendants, certain promissory notes and valuable securities, including assignments of several valuable rafts of timber, and as collateral security thereto a communication dated the 21st of September, 1876, addressed to the Crown Timber Agent at Ottawa, whereby he (Frazer) purported to pledge certain timber limits, namely, licenses numbers 470 and 471 of the years 1875 and 1876, and the berths described thereby, on the Black River in the Province of Quebec, then owned by him (Frazer), to the said Benoit, as manager for the defendants, for advances made and to be made to him (Frazer), and requested the Crown Timber agent to note the supposed pledge thereby given on the licenses of the said limits and renewals thereof.

3. That this supposed pledge was received by the Crown timber agent, and an endorsement of its purport noted by him on the said licenses, and that on the 24th of January, 1877, Frazer, with the consent of Benoit, on behalf of the defendants, cancelled the said supposed pledge, and gave what purported to be a new pledge of the licenses to the defendants, that the said cancellation and last mentioned supposed pledge were received on that date (the 24th January, 1877), and the endorsements of the cancellation noted by the Crown timber agent on the first mentioned supposed pledge, and that endorsements of the supposed new pledge were noted upon the said licenses, and subsequently upon renewals thereof as they were from year to year issued.

4. That the said Frazer on the 7th day of July, 1881, assigned all his right, title, and interest in and to the said timber limits to one Robert Grant, who, on the 7th day of October, 1881, assigned the same to the plaintiffs, and that *the plaintiffs thereby became, and now are, the owners thereof, and entitled to the issue of the licenses for the same.*

The plaintiffs admit that in the month of September, 1876, Frazer was indebted to the defendants in a large sum of money for advances that the defendants had theretofore made to him for carrying on his lumbering operations for which advances the defendants held his promissory notes, and as collateral security for the repayment of such advances that Frazer pledged the lumber berths 470 and 471 of the years 1875 and 1876 to Benoit, the defendants' manager at Ottawa, for and on behalf of the defendants, and that the pledge was noted on the licenses of the said berths by the Crown Timber agent.

2. That during the years 1877, 1878, and 1879, Frazer continued to receive advances upon his promissory notes from the defendants for the carrying on of his lumbering operations, and that at the close of the lumbering season of each of the said years he (Frazer) transferred a raft of timber manufactured by him on the said limits to the defendants to secure the re-payment of the advances made during the preceding season, *and that in the year 1879 prior to the sale of the said timber by the defendants Fraser was indebted to the defendants in a large sum, and that the defendants held as collateral security for the payment thereof the said pledge upon the timber berths and three rafts of timber.*

3. That at the time of the assignments from Frazer to Robert Grant and from him to the plaintiffs, both Robert Grant and the plaintiffs were well aware, and had actual notice of the pledge of the said timber berths to the defendants, *that the assignments were made, received, and taken in the Crown Timber office subject to the pledge and to the defendants' lien thereunder, and that they (Robert Grant and the plaintiffs) were also aware that Frazer was indebted to the defendants and that the pledge was held by the defendants as a security for such indebtedness.*

4. That in the year 1881 while Frazer was still indebted to the defendants in a large sum, and the pledge still in force, the defendants in order to retain their security upon the timber berths, and to prevent them being rendered

valueless, and for the purposes of making them more valuable for being realized by the defendants requested the Crown Lands Department to issue licenses of the said births directly to the defendants, *and that on the 22nd day of April, 1882*, the licenses of the said timber berths were issued to the defendants accordingly.

5. That the procuring of the licenses as aforesaid by the defendants to themselves was for the purpose of continuing their security intact for Frazer's indebtedness to them, and that the defendants for the purpose of keeping on foot the security afforded by such licenses paid the annual ground rent and charges of the Crown Timber Department upon the said timber berths.

To this state of facts both plaintiffs and defendants are for the purposes of the suit bound, for each has either pleaded or admitted the whole of it.

It was agreed that a copy of section 28 of the Revised Regulations respecting the sale and management of timber on Crown lands in the Province of Quebec should be put in and used. It is as follows :

"28. Limit holders in order to enable them to obtain advances necessary for their operations shall have a right to pledge their limits as security without a bonus becoming payable, such pledge in order to affect the limit against the debtor shall require to be noted on the back of the license by an authorized officer of the Crown lands. But if the party giving such pledge shall fail to perform his obligations towards his creditor, the latter by establishing the fact to the satisfaction of the commissioners may obtain the next renewal in his or their own name subject, to payment of the bonus, the transfer being then deemed complete."

It was also agreed that the pledge of the limits to Benoit dated 21st of September, 1876, was as follows :

"A. T. RUSSELL Esq., Crown Land Agent, Ottawa.

SIR,—I hereby pledge the lumber berths on Black River, described by licenses Nos. 470 and 471 of 1875, to Samuel Benoit Esq., manager of La Banque Nationale at Ottawa, for advances made and to be made to me necessary for

my operations, and I request that you will note the pledge on the said licenses and renewals thereof in accordance with regulations of February, 1874.

"I am, sir, your obedient servant,
"ALLAN FRAZER."

Also that the subsequent pledge to the defendants recorded the 24th day of February, 1877, was as follows:

"OTTAWA, 24th of January, 1877.

"A. T. Russell Esq., Crown Timber Agent, Ottawa.

SIR,—I hereby pledge all my rights, titles and interests in and to licenses Nos. 470 and 471 of 1875-76, and the berths described thereby on the Black River to La Banque Nationale at Ottawa.
ALLAN FRAZER."

"I hereby with the consent of Samuel Benoit Esq., manager of the said bank, cancel the pledge made to him on the 21st of September last.
ALLAN FRAZER."

This cancellation seems to have taken place. It was not contended that the documents were not sufficient as a matter of conveyancing.

The contention on the part of the plaintiffs respecting this part of the case was that the limit holders could not under the 28th section of the regulations create any lien upon the limits for money advanced in the then past, no matter for what purposes the money had been advanced, that the words "in order to enable them to obtain advances," point only to the future and cannot enable them to pledge limits for past advances, and that so far as the pledge was for then past advances it was unauthorized. It was admitted that the pledge was made without the payment of a bonus, and that it was not intended that any bonus should be paid. It was admitted that the pledge would have been good as to future advances but for the fact that it was made to a bank. But having been made to a bank it was not good even as to future advances.

The conclusion of this argument was that the pledge was not good as to either then past or future advances.

The defendants in the admissions guard themselves as to the meaning that might be applied to the past advances,

by saying in effect that what is meant is past advances made by them in the usual course of their business, to or on account of Frazer. For the purpose of reading the 28th section of the regulations, I think I should have been told what was the law, or effect of the regulations, immediately before the adoption of this section. But after the best consideration I have been able to give the subject, under the circumstances, I am of the opinion that the meaning contended for by the plaintiffs is not the true meaning, and that the contention cannot be sustained. I think it involves entirely too narrow a reading of the section. The section seems to me to relate chiefly to the payment or not of the *bonus*. In the absence of any evidence of the law of Quebec to the contrary, I must assume that where there is no special restriction a man may sell or pledge that which he has. This section says that he may pledge the property or right in this particular instance without paying a bonus, it being fairly assumed, I think, that upon an ordinary pledge or transfer a bonus is payable. But, apart from this I cannot bring myself to think that the words "in order to enable them to obtain advances," so limits the meaning as to confine it wholly to future advances to the exclusion of advances made, perhaps the day before, for the identical purpose, and there is no doubt that all the advances spoken of were advances necessary for the purposes of Frazer's operations. This is not questioned.

It is also to be observed that the provisions of this 28th section that are material here are affirmative provisions, there being nothing of a negative or disabling character contained in them. This is sometimes considered most material. See the language of Lord Cairns, in the case *Murray v. Bush*, L. R. 6 H. L., at p. 67. That was of course a different sort of case, but nevertheless the language of the distinguished Judge seems to apply here and lead to the conclusion that if the intention had been that a pledge made otherwise according to the provisions of the section, but for then past advances should be bad or inoperative, a negative provision would have been found in the section.

On this branch of the contention I am of the opinion that the plaintiffs cannot succeed.

In the argument of the case on the question as to whether or not the taking of the security was in contravention of the provisions of the Banking Act, both counsel seemed to rely upon the case *Commercial Bank v. Bank of Upper Canada*, 7 Gr. 250, and in Appeal, *Ib.* 423. That case was, however, as it appears to me, not like the present case. There the £1,000 that was held not to be secured by the mortgage there in question was money lent at the time and upon the security of the mortgage, and it was said that for all that appeared the mortgagor was at liberty to draw the sum afterwards and apply it in any way that he saw fit, and the Court said that the prohibition contained in the first part of the 19th section of 6 Vic., cap. 27, made the point plain against the validity of the security. I have compared the statutes under which that case was decided with the Act in force at the present time, and I do not perceive any substantial difference so far as the point I have to decide is concerned. The then Chancellor in his judgment in the Court below said, at p. 254: "Had I been able to satisfy myself on the one hand that the Legislature merely meant to prohibit this institution from embarking in land speculations, and that this transaction, which clearly was not of that character, ought, therefore, to be upheld; or on the other hand, that they meant to prohibit mortgages in every case, except when taken as a collateral security for a debt contracted at a previous time—had I been able to adopt either view, the law would have rested, I must admit, on a more satisfactory basis. But I have not been able to reconcile either construction with the language of the statute." In delivering the judgment of the Court of Appeal affirming the judgment appealed from, Sir John B. Robinson, C.J., said, at p. 430: "When it is shown that the mortgage in any case was taken by a bank 'as an additional security for a debt contracted to it in the course of its business' then the question occurs whether that can only be taken to

mean a debt that had been *previously* incurred with it in the course of its business, or whether a mortgage may not be taken as an additional security for a debt that had no previous existence, but which the bank were about to allow a party to contract, *by advancing him money at that time in the course of their business*, as for instance, &c." The learned Chief Justice then puts a case, involving a present advance by the bank, upon a commercial transaction and the taking of a mortgage upon real estate as on additional or collateral security for the payment of the advance, and proceeds by saying: "That is not this case, and I shall only therefore say, that as the words of the statute are not against it, so I think it might perhaps be held that the spirit and intention of the Act are not opposed to it; and that a mortgage so taken might be upheld, when it appears that the mortgage was really and in truth taken to secure the transaction upon the bill" (the bill mentioned in the imaginary case stated)" and not that the bill was created for the mere purpose of upholding and giving colour to the mortgage," which he said would be a question for the jury.

In the case *Royal Canadian Bank v. Cummer*, 15 Gr. 627, the late Chief Justice (then Vice-Chancellor) in his judgment said, at p. 631: "Taking the simple fact of deposit by way of security by the debtor of a bank, to a bank, there being a debt, and there being further advances contemplated but not yet made, a deposit for the debt due would be lawful; but a deposit by way of security, against which the bank customer might draw, would be against the law; and the law upon this point is so well known to bankers that they would hardly be likely to transgress it."

Neither of these cases seems like the present case. Here the bank did not contract to advance any specified sum. They did not, as it appears to me, become bound to make any advance at all. There was not any sum for which the bank customer Frazer might draw upon the bank on the security of the pledge, and it is not the case of a present advance on the security of it (the pledge), which was to be

additional security, that is, additional to such securities as Frazer might give upon contemplated transactions between him and the bank in his lumbering business, as well as for the advances that had theretofore been made.

In *Royal Canadian Bank v. Cummer*, 15 Gr. 627, the contemplated future advances in respect of the "Buffalo Drafts" had been otherwise paid and satisfied, and no question really arose as to them. In the other case, *Commercial Bank v. Bank of Upper Canada*, 7 Gr. 250, 423, the £1,000 was lent upon the security of the mortgage, and as to this sum the mortgage was held bad.

It was contended that even though the transaction in question was against the provisions of the Banking Act, yet only the Crown could take advantage of this, and in support of this contention the cases *Ayers v. The South Australian Banking Co.*, L. R. 3 P. C. 548, and *National Bank v. Matthews*, 98 U. S. S. C. 621, were referred to. These cases do seem to support the contention, at all events to some extent, but, in the forme of them it is to be observed that the Court remarked that there was no plea of illegality. I think, however, that upon this contention I am bound by the case *Commercial Bank v. Bank of Upper Canada*, for although such a contention was not there set up, there is the decision of the Court that as to the £1,000 the mortgage was bad as being in contravention of the Act, and the proceedings were not, in fact, at the instance of the Crown.

I think the transaction falls within the prohibition contained in the 40th section of the Act, for I think it cannot be said that the advances were not made upon this security, although they were to be thereafter made in the course of a business between the bank and its customer, when no doubt other securities would be obtained at the time of making the advances. And I do not see that the transaction can be said to be one in which the lien was taken by the bank as additional security for debts "*contracted*" to the bank in the course of its business, so as to bring it within the meaning of the provision contained in

the 41st section of the Act. 'The most extended meaning to be given to the word "contracted" intimated in the case *Commercial Bank v. Bank of Upper Canada* is contracted in the past, and contracted at the time of the advance being made, and it is not made clear that this last meaning may be applied to the words of the Act; and if the matter in difference rested here I should be of opinion in favour of the plaintiffs upon this contention.

It was admitted in argument, and I do not see how it could be otherwise, that if a security, for instance a mortgage upon lands, were given to a bank as security for future advances in contravention of the Act and therefore bad, yet that if, after the debt had been contracted in the course of business or the advances made, another mortgage were executed upon the same property as additional security for the debt so contracted or advances made, this mortgage would be good, and for the defendants it was contended that the issuing of the licenses directly to the defendants on the 22nd of April, 1882, was just such an act as the giving of the subsequent mortgage as above, it being admitted and beyond all doubt that at this time all the debts of Frazer to the bank had been contracted, and all the advances made to him.

It was, on the other hand, contended for the plaintiffs that this act must be considered to have been in the nature of a foreclosure of the security and had relation back to the date of the pledging of the licenses by Frazer to the bank.

The fact is that on the 22nd of April, 1882, the defendants did obtain the issue of the licenses directly to themselves and apparently they are the owners of them, but they say they only claim to hold a lien upon them as additional or collateral security for Frazer's indebtedness. One of the admissions is that in the year 1881 while Frazer was still indebted to the defendants in a large sum and the pledge still in force, the defendants in order to retain their security, and to prevent its being rendered valueless, and for the purpose of making the limits more valuable for

being realized by the defendants, requested the department to issue the licenses to them, and that they were accordingly issued, &c. Another admission is, that the procuring of the licenses to be issued to the defendants was for the purpose of continuing their security intact for Frazer's indebtedness to them.

The admissions that were made have proved to be in some respects embarrassing to me. But there can, I think, be no reasonable doubt that the defendants when they obtained the renewal of the licenses in their own name, did so under and in accordance with the provisions contained in the latter part of section 28 of the regulations, which provides for the pledgee obtaining the renewal, in case of a default, in his own name, subject to the payment of the *bonus*, and says or declares that the "Transfer" shall then be deemed to be complete. This is, I think, the equivalent of saying that when the pledgees have thus obtained the renewal in their own name, they have a complete title to the property, or at least a title as complete as that which the pledgor had. I think it must be assumed that the Government in so granting the renewal to the defendants acted properly, and it is not shown, nor does it appear that they, the Government, were in any way misled or deceived. I do not think that the admitted intention of the defendants or their admitted purpose in obtaining the renewal in their own name, makes any difference in this respect, for it does not appear that they made any representation to the plaintiffs regarding such intention or purpose, or that the plaintiffs were in any way misled or lulled into quietude by the conduct of the defendants in respect to the obtaining of this renewal. I think the defendants without so far as appears, misleading the Government or misleading or deceiving the plaintiffs, obtained by procuring the renewal in their own names under the provisions of section 28, a complete title to whatever rights the plaintiffs as assignees of Frazer had in respect of the limits in question. This title, as I understand the case, is not attacked before me, and I do not perceive that if the proceeding taken to obtain this

rerewal in the name of the defendants is, as contended for on behalf of the plaintiffs, to be looked upon as a sort of foreclosure of the security, that this would make any difference, for the party who forecloses is, after the foreclosure, the owner of the property as against the party who mortgaged or pledged it to him.

It seems to me that the case stands thus, and that what I am asked to consider may be disposed of on this short ground. The defendants had, at the commencement of the action, the right as against the plaintiffs to say that they, the defendants, were the owners of the property. The defendants did not do so, but volunteered to say that they claimed only a lien upon it, but this lien they claimed for the whole amount of the indebtedness of Frazer to them. The defendants being, as against the plaintiffs, the owners of the property, I think they had the right to take this position. I do not think that the defendants, really having a right to more, can, by reason of any statement or admission they appear to have made, be confined to anything less than what is claimed in or by such statement or admission. What they claim is payment in full of Frazer's indebtedness to them, and on this being made they will convey or transfer the property to the plaintiffs. In this I think the defendants are right, and I do not see that the plaintiffs are, under the circumstances, in a position to complain of this.

The question I am asked to determine is, whether or not the defendants have a lien upon the property for the full amount of Frazer's indebtedness to them or for any amount, and I am of the opinion that the defendants have, on the case shown before me, a right at least as great as a lien for the full amount of such indebtedness, and claiming as they do such lien, I think, they are entitled to it. The judgment will be for the defendants, declaring that they have a lien for the full amount of the indebtedness as claimed by them. I apprehend the matter of costs has been provided for by the minutes in respect of the other branches of the case that have been consented to by

Counsel, before referred to. If, not, I will hear what may be said upon the subject.

Judgment accordingly for the defendants.

A. H. F. L.

[CHANCERY DIVISION.]

CAMERON ET AL V. CARTER ET AL.

Purchase by instalments — Outstanding incumbrance — Misrepresentation — Specific performance—Rights of purchaser.

Cain agreed to sell lands to Carter for \$1,400, payable in yearly instalments of \$100 each, with interest, and covenanted that on payment he would convey to Carter in fee simple, free from incumbrances. There was, at the time of this agreement, a mortgage on the property still in force, payable some years before the last instalment of purchase money. C. & C., to whom Cain had assigned the agreement, now sued Carter for certain instalments overdue.

Held [reversing the decision of PORUDROOT, J.], that C. & C. were bound to ensure the defendant, in making the intermediate payments, that he, the defendant, would have a good title, clear of incumbrances, when the period of completion of the contract had arrived.

When the price is payable by instalments, the purchaser of land has a right to have a reference as to title, and to have title manifested before he makes a single payment.

Held, further, as to the alleged misrepresentation, that it was not such as would avoid the contract, but it would cast it upon the vendor to make good his representation before he could compel the payment of the purchase money. But, in any event, a purchaser of land has a right to assume that the title is good, and that it is free from incumbrance, and to require this to be shewn before he can be compelled to pay any part of his purchase money.

Gamble v. Gummerson, 9 Gr. 199, approved of.

In this action Cameron and Campbell sued Richard Carter, claiming payment of certain instalments of purchase money which they alleged to be overdue and unpaid under an agreement for the sale of certain lands, dated August 20th, 1881, and made between the defendant and one Roger Cain, who by deed of December 3rd, 1881, assigned the same to the plaintiffs.

The agreement in question, after reciting that the said Cain had agreed to sell, and the defendant to buy the lands for the sum of \$1,400, payable in fourteen annual instalments of \$100 each, with interest on the whole of the unpaid principal on the first of January in each year, the first payment to be due on January 1st, 1872, interest to be computed from the date of the agreement, went on to state as follows :

Now it is hereby agreed between the parties aforesaid in manner following : that is to say, the said party of the second part (the defendant), for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree, to and with the said party of the first part (Cain), his heirs, executors, administrators, and assigns, that he or they shall well and truly pay or cause to be paid to the said party of the first part his heirs, executors, administrators, and assigns, the said sum of money above mentioned, &c.

In consideration whereof, and on payment of the said sum of money, with interest thereon as aforesaid, the said party of the first part doth for his heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said party of the second part, his heirs, executors, and administrators or assigns, to convey and assure, or cause to be conveyed and assured, to the said party of the second part, his heirs or assigns, by a good and sufficient deed in fee simple, all that the said piece or parcel of land above described, * * And also shall and will suffer and permit the said party of the second part, his heirs and assigns, to occupy and enjoy the same until default be made in the payment of the said sums of money, or the interest thereof, or any part thereof, on the days and times and in manner above mentioned ; subject, nevertheless, to impeachment for voluntary or permissive waste.

And it is hereby expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the time and in the manner above mentioned, the said party of the first part shall be at liberty to re-sell the said land. And it is expressly agreed that at the end of five years, if the party of the second part cannot pay for the land, the party of the first part agrees to refund the principal paid ; at least six months' notice must be given for the first day of January previous to the five years of the intention to leave the land.

In witness whereof, &c.

The defendant, in his statement of defence, alleged that he was induced to enter into the said agreement for the purchase of the land by the false and fraudulent representation of Cain that the land was free from incumbrances, whereas he had since learned that the land had been at

the time of the agreement, and was still, subject to a mortgage made by Cain to the North British Canadian Investment Company: that the plaintiffs, at the time of the assignment to them of the agreement in question, had notice of the said representations and of their untruth: that the said mortgage was outstanding and unpaid, and the plaintiffs, by reason thereof, were unable to perform the part of the said agreement to be performed by Cain: that before the commencement of this suit he had offered to pay the plaintiffs the instalments due under the agreement, if the latter would give him reasonable security that when the payments mentioned in the agreement were paid they would convey and assure the lands to him as provided for by the said agreement, but the plaintiffs declined to give any security or undertaking; and that he was always ready and willing to pay such past due instalments upon being secured that he would, when entitled thereto, receive a deed according to the terms of the agreement. And by way of counter-claim the defendant claimed that the plaintiffs might be ordered to procure and register a discharge of the said mortgage, or give the defendant satisfactory security that they would pay the money secured thereby, and that the same would be discharged.

The action was tried on October 30th, 1884, at Walkerton, before Proudfoot, J.

The evidence shewed that the mortgage to the North British Canadian Investment Company was dated July 22nd, 1878, and was to secure \$900 and interest, and that the principal was payable ten years from the date. There was no evidence that the plaintiffs had notice at the time of the assignment of the agreement to them of any such misrepresentation as was alleged by the defendant.

O'Connor, for the plaintiff.

D. Robertson, for the defendants.

At the close of the evidence his Lordship delivered judgment for specific performance according to the terms of

the agreement, with liberty to the plaintiffs to apply, as the instalments came due, to have an order made for their payments, and decreeing payment of the arrears.

His Lordship observed: "As to the objection Mr. Robertson makes that there was a misrepresentation as to incumbrances, I do not think that of itself would be an answer to a decree for specific performance. Then that is no objection to specific performance, but the real objection is, that it cannot be obtained yet. I have no right to shorten the time the parties have agreed upon for the payment of the money and the execution of the conveyance. All that I can do is to make a declaration that the plaintiffs are entitled to have the agreement performed, and for the payment of the arrears, and to have liberty to apply, as the other instalments become due, if not paid. I can make a decree against the plaintiffs to this extent, that they must remove the mortgage as it falls due; I cannot make them give security, but I can make an order for them to do that. I will simply declare that the plaintiffs are bound by the terms of the agreement."

The defendant moved by way of appeal before the Divisional Court, and the motion was heard on February 18th, 1885, before Boyd, C., and Ferguson, J.

H. J. Scott, Q. C., for the defendant. The Judge was wrong in holding the matters in question to be simply matters of conveyancing. The result of the existence of the incumbrance is, that the defendant was unable to borrow on the land. I refer to *Chantler v. Ince*, 7 Gr. 432; *Thompson v. Brunskill*, 7 Gr. 542; *Gamble v. Gummerston*, 9 Gr. 193; *Fisken v. Wride*, 7 Gr. 599, 11 Gr. 245; *Robson v. Wride*, 15 Gr. 111; *Hilliard on Vendors*, 2nd ed., p. 242; *Swan v. Drury*, 22 Pick. (Mass.) 485. The evidence shews that the purchase was made on the faith of Cain's representations as to there being no incumbrances. The assignment was merely an assignment of a chose in action, and the plaintiffs are in no better position than Cain would be.

A. H. F. Lefroy, for the plaintiffs. On the contract as it stands, apart from misrepresentations, the defendant is plainly not entitled to resist paying the instalments until secured against the mortgage. To hold that he is would be to contradict the express terms of the contract, which provides that on payment of the purchase money, and not before, a good deed will be given. *Expressio unius exclusio alterius*. Besides *Chantler v Ince*, 7 Gr. 432, is a direct authority in our favour. *Gamble v. Gummerson*, 9 Gr. 193, is a different case. There the outstanding interest was a right of dower, not a mere pecuniary incumbrance. Mortgages are matter of conveyancing only, not of title: *Dart on Vend. and Purch.*, 5th ed., p. 284. Besides the alleged misrepresentation is on an immaterial point, and cannot be considered to have been fraudulent: *Hume v. Pocock*, L. R. 1 Ch. 379. The mortgage is payable off before the defendant can claim a deed. Moreover no proceedings have as yet been taken against the defendant under it: *Thomas on Mortgages*, Ed. 1877, p. 292-3; *Chantler v. Ince*, supra, at p. 433; *Cane v. Lord Allen*, 2 Dow. 289. But there is no sufficient proof of the misrepresentation: *Waterman's Specific Performance*, p. 426; *Story's Eq. Juris.* sec. 200. Besides, the plaintiffs had certainly no notice of it, and the contract cannot be affected by it as against them: *Pollock on Contracts*, 3rd ed., p. 556; *Eagleson v. Howe*, 3 A. R. 566; *Dart on Vend. and Purch.*, 5th ed., pp. 804-5.

March 21st, 1885. *BOYD, C.*—The plaintiffs are entitled to specific performance of the contract if they can ensure the defendant in making the intermediate payments that he, the defendant, will have a good title clear of encumbrances when the period of completion has arrived. But the plaintiffs are not justified in seeking to enforce payment of all the instalments, leaving a merely personal remedy for the defendant in case the plaintiffs should not be in a position so to convey. I agree entirely in the views expressed by *Esten, V. C.*, in *Gamble v. Gummerson*,

9 Gr. pp. 199-201, and in his criticism upon *Chantler v. Ince*, 7 Gr. 432. I think that the rule has often been recognized in this Court, that when the price is payable by instalments the purchaser has a right to have a reference as to title, and to have title manifested before he makes a single payment. One of the latest cases is *Wardell v. Trenouth*, 24 Gr. 467. In the present case the weight of evidence is favourable to the conclusion that the purchaser went into the contract on the faith of the vendor's statement that the estate was free from incumbrance. This is not such a misrepresentation as would avoid the contract, but it would cast it upon the vendor to make good his representation before he could compel the payment of the purchase money. But were this not so, I would go further and adopt the view of Esten, V. C., when he says: "When an estate is offered generally for sale, the purchaser has a right to assume that the title is good, and that it is free from incumbrance, and he has a right to require this to be shewn before he can be compelled to pay any part of his purchase money." The defendant will be sufficiently protected in this transaction by the observance of one of two precautions, *i. e.*, either by directing his purchase money to be paid into Court so as by its accumulation to provide a fund to pay the outstanding mortgage (I understand that it is more than sufficient for this purpose), or by requiring the plaintiffs to give security to the satisfaction of the Master against the mortgage, as directed in *Fildes v. Hooker*, 3 Mad. 193. The judgment in appeal should be varied so as to protect the defendant according to the judgment now pronounced.

This should be with costs of action and of appeal, as the defendant has substantially succeeded in his defence.

FERGUSON, J.—The judgment in this case is affirming the judgment for specific performance of the contract, but providing for security to the defendant against the mortgage on the lands which was not disclosed at the time of the purchase and sale, and giving the defendant the costs

as he set up by his defence the matter on which he succeeds. The Chancellor has in his judgment stated the whole matter in detail, and it is not worth while to repeat matters about which there is no difference of opinion, and which are of a simple character.

A. H. F. L.

See *McDonald v. Murray*, 2 O. R. 573; reversed in appeal, June 30th, 1885; and *McCrae v. Backer*, 21 C. L. J. N. S. 137.—*REP.*

[CHANCERY DIVISION.]

KITCHEN v. DOLAN.

Purchase of land—Evidence of agency—Acquisition of legal estate by agent—Statute of Frauds.

D. agreed to purchase certain lands as agent for K., and accordingly executed an agreement for the purchase of the same in her own name.

Held, that the evidence of D.'s agency was receivable though not in writing, and that no subsequent dealing of D., as by acquiring the legal estate, could operate to the disadvantage of K.

Quære, whether *Bartlett v. Pickersgill*, 1 Cox. 15, 4 East 577, n. is still to be regarded as good law.

THIS action was commenced on October 21st, 1884, and was brought by Lyman Wells Kitchen against the trustees and executors under the will of his father, William Kitchen, and against his sister Charity Eva Dolan, a married woman, claiming to have her declared to be a trustee of certain lands for him. The action as against the trustees was dismissed shortly after its commencement, and the proceedings were continued against Charity Eva Dolan alone. The plaintiff alleged in his statement of claim that the executors and trustees under the will of his father advertised for sale by auction, pursuant to the trusts of the said will, certain land in the village of Bloomsburg, and the sale was held on September 6th, 1884, when himself

and the defendant were present : that immediately before the sale, being desirous of purchasing the land but unable for want of money to comply with the terms of sale, he asked the defendant to be his surety for the payment of the purchase money, and the defendant promised and consented to be his surety as aforesaid : that the lands were then offered for sale, and were knocked down to him for \$420, and he was declared the purchaser for that sum : that in pursuance of her said promise the defendant, at his request, and solely for the purpose of being his surety as aforesaid, and not for her own use and benefit, but for his use and benefit, duly executed a contract to purchase the land at the said price : that shortly afterwards, being desirous of having the land conveyed to him, he tendered to the trustees the amount required to be paid according to the terms of sale, and was ready and willing to do everything on his part to entitle him to a conveyance thereof in fee, but the defendant in fraud of him, and in breach of her express promise, forbade the trustees to convey the land to him, and claimed that she had purchased it for her own use and not as trustee or for the use of the plaintiff ; whereupon the trustees conveyed the land to her, and she still held it and refused to convey it to him, and excluded him from possession : and he claimed to have the defendant declared to be a trustee of the land for him, and ordered to convey to him and deliver up possession ; and for all proper directions and general relief.

In her statement of defence the defendant said she signed the contract of purchase for the purpose of acquiring the same for her own benefit, and denied all charges of fraud and improper conduct, or that she ever gave any valid promise to become a surety for the plaintiff for any part of the purchase money of the land, or to purchase the same as trustee for him : and that such promise was not binding at law, because not evidenced by writing as required by the Statute of Frauds.

The rest of the facts of the case sufficiently appear from the judgment.

The action was tried on March 26th and 27th, 1885, at Simcoe, before Boyd, C.

W. Cassels, Q.C., and *T. G. Matheson*, for the plaintiff, cited: *Cave v. Mackenzie*, 37 L. T. N. S. 218; *Williams v. Jenkins*, 18 Gr. 536; *McClung v. McCracken*, 2 O. R. 609.

E. Martin, Q.C., and *R. T. Livingstone*, for the defendants, cited: *Bartlett v. Pickersgill*, 4 East. 577n; *Heard v. Pilley*, L. R. 4 Ch. 548; *Story's Eq. Jur. sec. 1201*.

April 22nd, 1885. BOYD, C.—Upon the facts, my opinion is very decidedly in favour of the plaintiff's contention. The defendant undertakes to sign the agreement for purchase as his agent, and cannot be allowed, without perpetrating a fraud, to claim and hold the benefit of that contract for herself. The evidence of her agency can be received though it is not manifested in or by any writing, for reasons very fully given by Sir Geo. Jessel, in *Cave v. Mackenzie*, 46 L. J. Ch. 564. The action was in this case begun before any conveyance was executed by the vendors, and they were originally parties; having conveyed to the defendants *pendente lite* they were dismissed, and the agent is now the defendant. But the evidence is applicable to the state of affairs when the action was begun, and no subsequent dealing of the agent, as by acquiring the legal estate, could operate to the disadvantage of the plaintiff. This case is not, therefore, governed by *Bartlett v. Pickersgill*, 1 Cox 15, S. C. 4 East. 577n; even if that case is to be regarded as still to be followed in precisely similar circumstances. See *Heard v. Pilley*, L. R. 4 Ch. 548; *Williams v. Jenkins*, 18 Gr. 536; *Jenkins v. Eldredge*, 3 Story R. at p. 290.

Judgment is for the plaintiff, with costs, to be paid out of the defendant Dolan's separate estate, if any.

A. H. F. L.

[CHANCERY DIVISION.]

DAVIS V. HEWITT ET AL.

Horse racing—Illegal contract—Match made with non-owner—Stakeholder—
13 Geo. II. c. 19.

D. and H. agreed to match a colt owned by D. against a colt owned by S. Under the agreement the stakes were deposited with P., who, default being made by D., handed over the amount of D.'s deposit to H., although D. had previously demanded it back. D. is now bringing this action against H. and P. to recover the amount of the deposit,

Held, that the race was an illegal one under 13 Geo. II. c. 19, one of the participants not being the owner of the horse he bet upon, and therefore D. could not recover back from H. the deposit money, being himself *in pari delicto*.

Held, however, that inasmuch as P. should have handed back D.'s deposit on demand made before disposal, D. could now recover the amount of the same from P.

THIS was an action brought by Humphrey Davis against Simeon Hewitt and Peter J. Pilkey, claiming the cancellation or reformation of a certain agreement entered into by him with the defendant Hewitt in reference to a projected horse-race, and to recover certain moneys deposited by him with the defendant Pilkey as stakeholder, pursuant to the said agreement. The writ of summons was issued on June 2nd, 1884.

In his statement of claim the plaintiff set out the articles of agreement in question, which were in writing, and signed by Hewitt and Davis, and purported to be an agreement between them to make a match for two year old colts, Hewitt matching a two year old colt sired by Moonstone, owned at the time of the agreement by H. and W. Scott, against a two year old sired by Little Billy, to trot a race, mile heats, best three in five, over the Brantford Agricultural Driving Park, on June 3rd, 1884, the race being for \$500 a side, \$250 a side being at once deposited in the hands of P. J. Pilkey, as stakeholder, balance of stakes to be deposited in Pilkey's hands on or before June 3rd, 1884, either party failing to comply with the articles to forfeit all money down.

The plaintiff then alleged that at the time of the signing of the above paper he placed the sum of \$250 in the hands of the defendant Pilkey: that Hewitt had fraudulently and covinously led the plaintiff into signing the above paper, in the belief that two specific colts, one owned by the plaintiff and one by Hugh and William Scott, were to make the match in question, Hewitt intending all the time to take the objection that the plaintiff's colt was not, within the proper meaning of the words of the agreement, a two year old colt: that Hewitt did take the objection, and refused to run the match with the plaintiff's colt: that Pilkey colluded with Hewitt, and also refused to give back the plaintiff's deposit of \$250, though the plaintiff had demanded it, and would, unless restrained by injunction, pay it over to Hewitt. And the plaintiff claimed that the agreement might be declared void, or reformed so as to express the true agreement between the parties: an injunction to restrain Pilkey paying over any portion of the money in his hands as stakeholder pending this action: that he might be paid the \$250 deposited by him with Pilkey, costs of action, and further relief.

In his statement of defence the defendant Hewitt denied all charges of bad faith in the matter of the agreement, and stated that it arose out of the plaintiff's challenge, and the name of the horse the plaintiff desired to run was not filled in until the execution of it; and that he had always been willing to run the colt sired by Moonstone against the plaintiff's colt, notwithstanding that under the strict terms of the agreement the plaintiff had forfeited his deposit.

The defendant Pilkey in his defence said he had no interest in the matters in question: that he acted merely as stakeholder, and on default being made by the plaintiff duly paid over the moneys deposited to Hewitt.

The action was tried at Brantford on March 24th and 25th, 1885, before Boyd, C.

Moss, Q. C., and *Wilson*, Q. C., for the plaintiff. The parties intended there should be a contest between the two colts specified; but the defendant intended to take advantage of technical knowledge and would not agree to any understanding by which these two horses should be run. The right of the plaintiff to recover his money is clear, because the moment the money was demanded back, it should have been returned. This was either a bet or a match. If a match it was illegal, because one of the parties was not the owner of the colt in question. We are still under the law as in England: 13 Geo. II. c. 19; *Battersby v. Odell*, 23 U. C. R. 482; *Sheldon v. Law*, 3 O. S. 85; *Anderson v. Gulbraith*, 16 U. C. R. 57; *Carr v. Martinson*, 1 El. & El. 456. *Batty v. Marriott*, 5 C. B. 818, is now overruled by *Diggle v. Higgs*, 2 Ex. D. 422; *Hampden v. Dalsh*, 1 Q. B. D. 189.

A. J. Wilkes, for the defendants. This was a match, and not a bet: *Fulton v. James*, 5 C. P. 182. The case the plaintiff now tries to make is entirely new, and not raised by the pleadings.

Afterwards counsel for the defendants was permitted to put in a written agreement wherein he submitted on the evidence that there had been no revocation or determination of the wager on the part of the plaintiff, and no demand of the money deposited, and referred to *Varney v. Hickman*, 5 M. G. & S. 281.

April 22nd, 1885. *BOYD, C.*—The plaintiff having deposited the stake with the defendant *Pilkey*, to abide the result of the race in question was entitled to demand and recover it from him at any time before it was paid over to the other party to the race: and this more emphatically is the law when the race is an illegal one: *Varney v. Hickman*, 5 C. B. 271; *Batty v. Marriott*, *ib.* 818; and *Diggle v. Higgs*, 2 Ex. D. 422. That this is an illegal contract under 13 Geo. II. ch. 19, as expounded in *Battersby v. Odell*, 23 U. C. R. 482 (because one of the participants

was not the owner of the horse he bet upon) is not open to argument. The defendant Pilkey as stakeholder had express notice by the letter of February that the plaintiff demanded back his money, and by the issue and service of the writ herein on the 2nd of June last he had brought home to him a plain expression of the plaintiff's dissent to his dealing with that fund deposited by the plaintiff. The facts of the case as to revocation of the stakeholder's authority are stronger than those in *Hastelow v. Jackson*, 8 B. & C. 221. The case fails as to the defendant Hewitt for the reasons I gave at the hearing, because the money having gone into his hands upon an illegal contract cannot be recovered by one *in pari delicto*: *Houson v. Hancock*, 8 T. R. 575, and because he had not the money when the action was begun, and it should be dismissed, with costs as to him. As to the defendant Pilkey judgment should go for the amount deposited against him, without costs, as the plaintiff succeeds on a ground not taken in the pleadings, and has made charges of fraud and collusion which are not substantiated as against the stakeholder.

A. H. F. L.

[CHANCERY DIVISION.]

AMSDEN ET AL. V. KYLE ET AL.

Will—Construction—Widow's election—Implied intention to exclude dower.

A testator, by his will, left all his real and personal property to J. K., "subject to the following bequest, viz: to my wife E. K. a one-third interest in all my real and personal estate, so long as she shall remain unmarried."

Held, that E. K. was bound to elect between the will and her dower, for the former imported that there was to be the same manner of division of the land as of the personalty, viz: a division of the entire property of each kind, which would be defeated if dower were first substracted from the realty.

Re Quimby, Quimby v. Quimby, 5 O. R. 738, followed.

THIS was an action brought by William E. Amsden and Joseph Atkinson, as executors of the will of one James Kyle, deceased, for the interpretation of the said will.

The will in question was as follows:

"This is the last will and testament of one James Kyle, major, of the township of Camden, in the county of Kent. After paying all my just debts, &c., funeral and testamentary expenses, I give, devise, and bequeath to my nephew James Kyle of Anaskil, of the county of Tyrone, Ireland, all my real and personal estate and property subject to the following bequest, viz., to my wife Eliza Kyle, a one-third interest in all my real and personal estate, so long as she shall remain unmarried, and I hereby appoint William Edwin Amsden and Joseph Atkinson, of the village of Florence, or the survivor of either of them, executors of this my will, as witness my hand this sixteenth day of January, A. D., 1883."

The will was duly executed, and the the testator died January 21st, 1883.

The defendants were Eliza Kyle, who was the widow of the testator, and James Kyle, who was an infant nephew of the testator.

The statement of claim set out that the testator died possessed of property of considerable value, consisting principally of farm lands: that on March 27th, 1883, the plaintiffs, as executors, paid Eliza Kyle \$40 under the bequest to her in the said will, and at the time of such payment she stated she was willing to accept the said

bequest, and did not intend to make any other claim upon the estate of the said testator: that she subsequently claimed, and still claimed to be entitled to one-third of the whole of the said property, and also to dower in so much thereof as consists of real estate: that James Kyle claimed Eliza Kyle was entitled only to one-third of the property during widowhood or dower in the said real estate, but was not entitled to both. The plaintiffs claimed an interpretation of the will and a declaration whether Eliza Kyle was bound to elect between the benefits of the will and dower, and in case Eliza Kyle was not entitled to both, and was entitled to elect, that she be compelled to elect to take under or against the said will, and for general relief.

The defendant, Eliza Kyle, by her defence admitted the allegations of the statement of claim, except that she denied that she had made any such election as was imputed to her by the claim.

The action was tried at London, on April 24th, 1884, before Boyd, C.

R. Meredith, for the plaintiff.

Meredith, Q.C., for the infant defendant.

Slaght, for the widow.

At the close of the argument judgment was given that the widow had not elected or was not bound by the acts of election alleged, and also that the executors were bound to convert and invest the personal estate, and that the widow in any case was entitled only to one-third of the income arising from the investments of the personal estate, and costs of all parties were ordered to be paid out of the personal estate. Judgment as to whether the widow was bound to elect between the provisions of the will and dower was reserved.

Afterwards on May 7th, 1884, the learned Chancellor gave judgment on the point reserved, as follows:

BOYD, C.—The devise of one-third of the testator's land during widowhood would not *per se* interfere with the widow's right as doweress to claim another third for life. But according to judicial determinations which bind me, a clue to the testator's intention is found in the direction to divide the personal as well as the real estate. He gives to his wife a one-third interest in all his real and personal estate as long as she shall remain unmarried. That imports the same manner of division in the case of the land as in the case of the personalty, *i. e.*, a division of the entire property of each kind which would be defeated if the dower were first subtracted from the realty. The cases I followed in *Re Quimby—Quimby v. Quimby*, 5 O. R. 738, and that decision itself apply here to shew that the widow must elect. Costs of all parties out of the personal estate.

A. H. F. L.

[CHANCERY DIVISION.]

CASSELMAN ET AL. V. CASSELMAN.

Estoppel by deed—Subsequent acquisition of estate—Necessity of recital or covenant to create estoppel—Distinction between English and Canadian law—Conveyancing—Estate—Quit claim deed—Unwilling grantee.

M. C. made a voluntary deed of certain land to L. C. At that time M. C. had no title to the land, it having been previously sold for taxes and conveyed by sheriff's deed to B. There were no recitals or covenants for title in the deed to L. C., and by it M. C. did "assign, transfer, demise, release, convey, and forever quit claim" to L. C., his heirs and assigns, all his estate in the land. Subsequently B. sold and conveyed the land to M. C.

Held, that the deed from M. C. to L. C. did not operate by estoppel to vest the estate in the land subsequently acquired from B. in L. C., for (1) there was no recital or covenants for title; (2) it did not purport to grant any estate in the land, but merely to assign or release and quit claim to L., M. C.'s interest therein; (3) it never had any operation, for L. C. never paid anything for the land, never went into possession, never claimed to be owner of it, or paid the taxes, and from the first repudiated the gift.

It is a firmly established rule of property in Ontario that covenants for title are sufficient to work an estoppel, though it is otherwise held in England.

THIS was an action brought by John Saxon Casselman and Martin Major Casselman against Ralph A. Casselman, claiming an injunction to restrain the defendant from cutting timber upon the north half of lot ten in the fifth concession of the township of Cambridge, and a declaration as to the title to the said north half, and the reformation of a certain partition deed, under the following circumstances.

Martin Casselman purchased from James Jessup a number of lots of land and among them lot ten in the fifth concession of the township of Cambridge, and they were conveyed to him by deed dated March 17th, 1843. This lot with others, was sold for taxes on July 7th, 1847, by the sheriff, and by him was conveyed to George Brown the assignee of the purchaser on September 9th, 1848.

While the title was thus standing in George Brown and on the 20th of April, 1850, Martin Casselman by a deed made in pursuance of the Act to facilitate the conveyance of real property, and purporting to be in consideration of

£50, did "assign, transfer, remise, release, convey, and forever quit claim" to his nephew Levi Casselman "his heirs and assigns forever, all his estate, right, title, interest and possession of, in, and to the north east quarter of the lot number ten." To have and to hold the same unto the said Levi Casselman his heirs and assigns to his and their only use, benefit, and behoof forever. This deed was registered the 4th of March, 1851.

Upon the same 20th of April, 1850, Martin Casselman made another deed, similar to the last of the north west quarter of lot ten to another nephew, Simon Casselman, for a similar expressed consideration of £50, which was also registered on the 4th of March, 1851.

These last two deeds though purporting to be for value were in reality voluntary, and contained neither recitals nor covenants.

On the 15th of December, 1868, Martin Casselman purchased the north half of lot ten from George Brown for \$60, and it was conveyed by Brown to him by a deed of that date, which was registered on the 10th of February, 1871.

Martin Casselman made his will on the 7th of March, 1874, by which he devised the residue of his property to his sons Ralph, Saxon, and Major, being the parties to the present action, to be equally divided between them, share and share alike. The testator died on the 6th of November, 1881.

On the 5th of April, 1883, these sons met to make a division of the residue, except 150 acres. They gave a list of the lots to W. Z. Helmer, who divided them into three parcels supposed to be of equal value, and then the sons drew for the parcels. In the one that fell to the lot of Saxon was a lot twelve in the fifth concession of Cambridge. The testator only owned the south half of lot twelve. And the north half of lot ten was not included in the lots divided. The brothers gave the numbers of the lots to Helmer from memory. The north half of lot twelve and the north half of lot ten appear to have been of equal value.

By deed of April 13th, 1883, this division was carried into effect by mutual conveyances. That from Ralph and Major to Saxon recited the testator's will, and that Martin Casselman was at the time of his death the owner in fee simple of the lands thereafter mentioned, and the agreement to make a division; and that the lands thereafter described had been allotted to Saxon; and then it contained a grant to Saxon including lot twelve in the fifth concession in fee.

Ralph Casselman procured his cousins Levi and Simon to convey to him by two several deeds dated January 18th, 1884, the parts of lot ten appearing to be vested in them by the deeds from Martin Casselman, which were registered.

This action was brought by writ issued March 2nd, 1885, by Saxon and Major Casselman against Ralph, alleging that the north half of lot ten belonged to the testator at the time of his death, and that by error and mistake it was omitted from the partition, and that the north half of lot twelve was granted to Saxon instead of the north half of lot ten, and that the north half of lot twelve did not belong to the testator, and that the defendant was cutting timber on the north half of lot ten; and praying an account of timber cut and an injunction to restrain the defendant from trespassing, and asking a declaration that the north half of lot ten formed part of the testator's estate, and to have the partition deed to Saxon reformed by substituting the north half of lot ten for the north half of lot twelve, and damages, and further relief.

The defendant denied that the north half of lot ten formed any part of the testator's estate, and that it was intended to be included in the partition, and was omitted by error and mistake, and relied upon the title he derived through Levi and Simon, and alleged that the tax sale was void for various irregularities.

The plaintiffs replied that when the defendant procured the conveyances from Levi and Simon he represented to them that he was the agent of the residuary devisees, and procured them to execute the conveyances to him to perfect

the title of the residuary devisees, &c., and that he became thereby a trustee for the residuary devisees.

The action was tried at Ottawa, on April 30th, 1885, before Proudfoot, J.

D. McCarthy, Q.C., *D. B. MacTavish*, and *J. J. MacCraken*, for the plaintiffs. There are no covenants in the deeds from Martin Casselman, and consequently there is no estoppel.

Shepley, and *F. M. McDougall*, for the defendant. The tax sale was irregular and void. But apart from that Martin Casselman would be estopped from claiming the land in question. It is not necessary now that there should be a covenant in order to create an estoppel: *Doe Irvine v. Webster*, 2 U. C. R. 224; *Nicholson v. Dillabough*, 21 U. C. R. 591; *Bright v. McMurray*, 1 O. R. 172. The tax deed does not divest the title: *Munro v. Grey*, 12 U. C. R. 647; *McDonald v. Robillard*, 23 U. C. R. 105; *Cotter v. Sutherland*, 18 C. P. 357; *McKay v. Chrysler*, 3 S. C. R. 436. We also refer to *Williams v. Felker*, 7 Gr. 345; *Kerr on Fraud*, Am. ed., 371; *Cornstock v. Ames*, 3 Keyes (N. Y.) 357; *Beesley v. Hamilton*, 50 Ill. 88; *Bigelow on Estoppel*, 3rd ed. p. 580.

D. McCarthy in reply. A title by gift is not fed by estoppel. Moreover the deeds from Martin Casselman to his nephews do not carry the fee. See 9 Vic. c. 6; *Acre v. Livingston*, 26 U. C. R. 282; *Macdonald v. Georgian Bay Lumber Co.*, 2 A. R. 36. *Doe Irvine v. Webster*, 2 U. C. R. 224, is in favour of the plaintiffs. As to the tax sale, see 32 Vic. c. 36, s. 155; 33 Vic. c. 23, s. 1; *Fraser v. West*, 21 C. P. 161; *Jones v. Cowden*, 34 U. C. R. 346. Again, an estate does not vest by grant or devise without the assent of the grantee and devisee: *Re Dunham*, 29 Gr. 258; *Re Defoe*, 2 O. R. 623; *Foott v. Rice*, 4 O. R. 94; *Townson v. Tickell*, 3 B. & A. 31. See also *Trust and Loan Co. v. Ruttan*, 1 S. C. R. 534; *Heath v. Crealock*, L. R. 10 Ch. 22; *Crofts v. Middleton*, 2 K. & J. 194; *General*

Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society, 10 Ch. D. 15.

June 3rd., 1885. PROUDFOOT, J.—[After stating the facts of the case as above.] The validity of the sale for taxes was objected to chiefly because the evidence tended to shew that several lots had been included with lot ten in an assessment for a lump sum, and it had not been ascertained what was the sum separately assessed against lot ten, if separately assessed. And under the law, prior to the recent legislation, such an assessment would not have formed the basis of a valid sale. The cases cited by the defendant were decided under the former law, *Munro v. Grey*, 12 U. C. R. 647; *McDonald v. Robillard*, 23 U. C. R. 105; *Cotter v. Sutherland*, 18 C. P. 357. From the treasurer's book it appeared that the sale in 1847 was for ten years arrears. In 1839 the lot was sold for eight years arrears. In 1844 it was advertised for sale, but there were no bids. In 1845 it was again offered for sale, but there were no bids, and finally in 1847 it was sold for ten years arrears. I think it sufficiently proved that taxes were assessed and were in arrear, though there may have been some irregularity or defects in the assessing. But the 33 Vic., c. 23, ss. 1 & 2, (1869) render the sale valid notwithstanding such irregularities and defects. The first section enacts that where lands which were liable to be assessed, have been sold and conveyed under colour of the statute for taxes in arrear, and the purchaser had continued occupation four years prior to November 1st, 1869, and made improvements to the value of \$200, the sale should be valid notwithstanding irregularities in imposing the taxes, or if the taxes exceeded the amount lawfully chargeable, &c., &c. And the 2nd section made the first section apply to cases in which the tax purchaser shall not have occupied the land &c., provided he has since the sale and prior to November 1st, 1869, paid at least eight years taxes charged on the lands.

In the present case the lot was a wild or uncultivated lot, and neither the owner at the time of the tax sale, nor

the purchaser ever occupied the lot, but taxes have been paid for twenty years prior to 1869 by the purchaser or his grantor. If any irregularities did exist in the assessment or sale, they must be taken to have been cured by this statute: *Fraser v. West*, 21 C. P. 161; *Jones v. Cowden*, 34 U. C. R. 346, in App. 36 U. C. R. 495.

It thus appears that the title was outstanding in Brown when Martin Casselman made the deeds to his nephews Levi and Simon, and that nothing passed by these deeds. But it was contended that, Martin Casselman having subsequently acquired the fee by purchase from Brown, he is estopped from saying that he had not the estate when he made the deeds: the estoppel was fed by the legal title and became a title working in interest.

Assuming for the moment that these deeds ever had an operation, as to which I will say something in the sequel, I do not think they had the effect of an estoppel. They had neither recital of seisin of any estate, nor covenants for title nor for further assurance. There are many sentences in the elaborate judgment of Sir John Robinson, C. J., in *Doe Irvine v. Webster*, 2 U. C. R. 224, that shew his opinion to have been that a simple grant of the fee by indenture or by deed poll created an estoppel without recitals or covenants. Thus at p. 237 he says: "The rule I take to be, that where a man plainly and absolutely assumes to convey an estate when he has none, he cannot be allowed to maintain against his deed that nothing passed; and it is frequently laid down by the Courts in terms thus general, without alluding to the necessity of any recital;" and again, p. 237, "Nor am I prepared to say that when a man by deed without recital or covenant of any kind, assumes to convey an estate as if he were the absolute owner, he is not estopped from saying that nothing passed by his deed." But these matters were not necessary for the disposal of the case, for the deed poll there, though it contained no recitals, did contain a covenant that Knapp (the vendor) was seized in fee and the common clause of warranty of title (p. 225). In referring

to the state of the law on this subject, in *The Trust and Loan Co. v. Ruttan*, 1 S. C. R. 564, at p. 584, Mr. Justice Strong treats the decision as depending upon the covenant. He says: "Now for upwards of forty years it has been held in Upper Canada, that covenants for title, especially the usual covenant that the granting party is seized in fee at the date of the deed, a covenant which this deed contains in the absolute not in the ordinary restricted form, are as effectual in working an estoppel as a recital to the same effect would have been."

Besides the want of recital or covenant, the deeds in the present case are insufficient in another respect to create an estoppel. They do not purport to grant any estate in the land, but an assignment or release and quit claim of all the assignor's "estate, right, title, interest, and possession;" to hold the same to the assignee his heirs and assigns for ever. To quote again from Sir John Robinson, in *Doe Irvine v. Webster*, at p. 332: "It is in many places stated, that a deed of release cannot operate by estoppel, and clearly that is true when spoken of what is a *mere release*, or quit claim of a party's interest, whatever it may be, and it would be unreasonable to hold otherwise. By such a deed the releasor assures nothing absolutely; he does not *pretend* to convey the estate, but only such interest as he has in it, and if it turns out that in fact he had *no interest*, so that nothing passed by the deed, still the releasee has all that the releasor pretended to grant to him by the very terms of the deed—and to apply the doctrine of estoppel in such a case would be inconsistent with truth and reason, for upon what principle should a person be concluded from denying what he never had asserted."

The English cases show that a covenant is not sufficient to work an estoppel. See *Heath v. Crealock*, L. R. 10 Ch. 22; *Crofts v. Middleton*, 2 K. & J. 194; *General Finance &c, Co. v. Liberator, &c., Society*, 10 Ch. D. 15. But our decisions have been so long a rule of property here that they cannot be disturbed: see *Trust and Loan Co. v. Ruttan*, 1 S. C. R. at p. 584.

Upon another ground also I think there can be no estoppel, for these deeds to the nephews never had an effective operation. The land is wild land and only valuable for its wood.

Levi and Simon were both examined as witnesses, and established that their uncle had got the deeds prepared without consulting them, and sent the deeds to them. They never paid anything for the land, never went into possession, never made any claim to be owners. This lot was of such small value that it had been many times sold for taxes, and Simon says he didn't think it would pay him to keep it ; if he had thought it worth the taxes he would have paid the taxes and kept it. He told his uncle years ago he did not want it. Soon after the deed was made his uncle asked if he might cut a few trees, and he told him to cut what he wanted, does not know if he cut any. Simon never went to look at the land, it was in a wild part of the country. And Levi was equally decided to have nothing to do with it. The uncle paid taxes himself for many years after the deed to Levi and Simon.

You cannot "put an estate into a man in spite of his teeth," but Mr. Cruise says that all deeds, except feoffments, do, immediately upon their execution by the grantors, divest the estate out of the grantors, and put it in the party to whom the conveyance is made, though in his absence, and without his knowledge, till some disagreement to such estate appears: Digest 4th ed., Vol. 4., p. 9, s. 25. The rule is equally applicable to wills: *Townson v. Tickell*, 3 B. & Ald. 31. See *Re Dunham*, 29 Gr. 258; *Re Defoe*, 2 O. R. 623. The circumstances here shew that "some disagreement to such estate appears." The nephews always disclaimed any title, would not go to look at the property, never went into possession, and never paid taxes. The only thing that looks the other way was the request made to Simon to be allowed to cut some trees, when the uncle was told to cut what he would. But it is quite plain that this was not done in the exercise of any right of ownership, but as shewing an entire indifference to the matter. It was immaterial to

him what was done with the land or the trees as he did not look upon them as his.

The foregoing being sufficient to shew that the land belonged to the testator at the time of his death, and that it passed by his will, I do not think it necessary to examine minutely the manner in which the defendant procured the deeds from Levi and Simon. It was established by his own witness that he had lied to them, and by Levi and Simon, that he pretended to act for the benefit of the estate or of Saxon, while he was endeavouring to get hold of the property for himself.

It remains to consider what disposition is to be made of the lot. It is clear that there was a common mistake in including the whole of lot twelve in the deed to Saxon, for all agree in the recital that it had belonged to the testator, while he only had a title to the south half of it. The effect of this is, that Saxon gets 100 acres less than he should have. But I cannot say there was any mistake in not including the north half of lot ten. The plaintiffs were not examined. The lot was not named to Helmer as being the testator's. My impression is that, as it is proved both Saxon and the defendant searched the Registry office to find out what land belonged to their father, finding the north half of lot ten in the names of Levi and Simon, they thought it did not form part of the estate. The proper course would seem to be to have a new division of the whole estate, if that be possible, in which case as Major Casselman has assigned to Saxon, Saxon would be entitled to two-thirds and the defendant to one-third. If that cannot now be done the plaintiff Saxon should be entitled to two-thirds of the value of the north half of lot twelve, from the defendant and the defendant should get one-third of the north half of lot ten. But as the defendant swears they are of equal value, the simplest way would be to substitute the north half of lot ten, for the north half of lot twelve, in the lands conveyed to the plaintiff Saxon.

There will be a declaration that the north half of lot ten belonged to the estate of the testator; and the directions

as to the disposal of it may be made upon speaking to the minutes after the defendant has had an opportunity of considering the suggestions I have made.

The plaintiffs are entitled to costs.

A. H. F. L.

[CHANCERY DIVISION.]

CLAXTON V. SHIBLEY ET AL.

Tax sale—Sale for more taxes than really due—Irregularity—Matter of procedure—Owner present at tax sale—Estoppel—Laches—De minimis non curat lex—R. S. O. c. 180, s. 155.

Certain lands, worth from \$600 to \$800, having been sold in November, 1881, for \$6.06 taxes, being one-eleventh in excess of taxes really due. *Held*, that this vitiated the sale, and R. S. O. ch. 180, sec. 155, did not cure the error, and the maxim *de minimis non curat lex* did not apply.

It was further objected to the regularity of the said sale, that in 1881 neither the assessor nor the clerk returned the lands as occupied, as in fact they were, and further that the clerk did not examine the assessment roll when returned by the assessor as required by R. S. O. ch. 180, sec. 111.

Seem, that these are matters of procedure only, and would be cured by sec. 155.

It was proved that the owner was himself present at the sale in question, and purchased one lot which was ten or eleven ahead of the lot in question, and also another lot three below it on the list; but it was not shewn that he was present when the actual lot in question was sold.

Held, that he was not estopped by conduct from complaining of the sale.

Held, also, that the fact that the owner was informed within three months after the sale of the lot having been sold, when he might have redeemed it, would not deprive him of his right of action.

THIS was an action brought by William Claxton against Schuyler Shibley and Henry T. Shibley, for the purpose of setting aside a tax sale of lot 19, in the third concession of the township of Hinchinbrooke, in the county of Frontenac, of which before such sale he was the owner. The circumstances of the case are fully set out in the judgment.

The action was tried at Kingston on May 17th, and 18th, 1885, before Proudfoot, J.

Walkem, Q.C., and Machar, for the plaintiff, referred to *Yokham v. Hall*, 15 Gr. 335; *Edinburgh Life Assurance Co. v. Ferguson*, 32 U. C. R. 253; *Nelles v. White*, 29 Gr. 338; *McKay v. Cryslar*, 3 S. C. R. 436; *Blackwell on Tax Titles*, pp. 162, 281; *Cooley on Taxation*, pp. 295, 297, 336, 344; *Irwin v. Harrington*, 12 Gr. 179; *Fenton v. McWain*, 41 U. C. R. 239; *Beckett v. Johnston*, 32 C. P. 301; *Smith v. Midland R. W. Co.*, 4 O. R. 494; *McKay v. Ferguson*, 26 Gr. 236.

George Macdonald, for the defendant H. T. Shibley, referred to *Bank of Toronto v. Fanning*, 17 Gr. 514, S. C., in App. 18 Gr. 391; *Silverthorne v. Campbell*, 24 Gr. 17; *Fleming v. McNab*, 8 A. R. 656.

June 17th, 1885.—PROUDFOOT, J.—This is an action to set aside a sale of lot No. 19, in the 3rd concession of the township of Hinchinbrooke, for \$6.06, alleged arrears of taxes, the lot being worth from \$600 to \$800.

The sale was for the taxes of 1876, and the sale was made on the 21st of November, 1881; the deed from the sheriff to the purchaser, March 19th, 1883, and this action was begun October 14th, 1884.

A number of objections are made as to the regularity of the proceedings prior to the sale, but as two years had not elapsed since the execution of the deed to the purchaser, he cannot claim the benefit of the healing clause, sec. 156, of the Assessment Act, R. S. O., ch. 180; if any irregularities have occurred they must be judged by the sec. 155.

The defects or irregularities complained of are, that the sale was for more taxes than was due: that in 1881 the lands were occupied, but the assessor did not return them as occupied to the township clerk, and the clerk did not return them as occupied to the treasurer. Sections 109, 110, 111.

The objection as to the sale being for too much rests on the following facts. The lot was assessed in 1876 as resident land for \$4.88, and was returned by the township treasurer to the county treasurer, July 9th, 1877, as resi-

dent, but on which was no distress for \$2.30 unpaid. The collector's roll for 1876 shews that \$2.58 was paid, and a note is made that \$2.30 was relieved by the council. It seems that the township council passed a resolution on the 14th of December, 1877, after the return to the county treasurer, "that the collector be relieved from the uncollected balance of taxes due upon lot 19, in the 3rd concession, for the year 1876." But this resolution was inoperative as not having been perfected by by-law as required by section 117. The conclusive answer to the objection is, that it does not purport to remit the taxes, it only relieves the collector, which is quite consistent with the retention of the right of action for the unpaid balance under section 100, and a lien upon the land under section 105.

By some error, however, the balance was carried into the treasurer's book as \$2.50 instead of \$2.30, and 10 per cent. compound interest has been charged on the erroneous sum for five years, making in all\$4 01

To which has been added the cost of advertising. 1 95

And commission 10

\$6 06

the amount for which the sale took place. The return to the treasurer of the county was not made till July, 1877 it ought to have been returned before the 8th of April, sec. 113, and the balance ascertained on the 1st of May, on which the 10 per cent. is to be charged. No balance then could have been made on the 1st of May, 1877. The statute, sec. 124, authorizes the ten per cent. to be charged on the balance made on the 1st of May in every year. It would seem, therefore, that interest has been charged for a year too many. These may seem small matters, but the error amounts to about $\frac{1}{17}$ th of the tax, while the purchaser has paid only about $\frac{1}{110}$ th of the value of the land.

Then does sec. 155 cure the error. That section and sec. 129 originally formed sec. 4 of 27 Vic. ch. 19, except the clause stating the intention of the section. That sec. 4 was repeated in a similar form in 29-30 Vic. ch. 53,

sec. 131, and in 32 Vic. ch. 36, sec. 130, (O.) It was only severed upon the revision of the statutes. In its original form it was construed in *Yokham v. Hall*, 15 Gr. 335, as "meant merely to relieve the sheriff or treasurer from certain inquiries as to the value and position of the land, which this Court has held it was his duty to make before sacrificing thousands of dollars worth of property to obtain payment of a trifling sum for taxes." And having been so construed the same construction ought to prevail, although the enactment be divided into two sections. The general policy of the laws on this subject is expressed by Gwynne, J., in *McKay v. Chrysler*, 3 S. C. R. at p. 472, *et seq.*, as intended to cover defects in procedure, but not those of an illegal imposition of the tax. In *Nelles v. White*, 29 Gr. 338, the late Chancellor referring to 32 Vic. ch. 36, sec. 155, (O.) the equivalent of R. S. O. ch. 180, sec. 156, rendering sales valid if not impeached within two years, says at p. 345: "It has not been decided, I believe, since that statute or the two statutes on the subject preceding it, that when there have been some taxes in arrear, but the sale has been for more taxes than are in arrear, the defect is cured. But in several of the cases decided since these statutes, the import of the language of the Judges has been that they apply only to matter of procedure. Individually, I should incline to think that where taxes are shewn to have been in arrear for a sufficient time to warrant a sale, a sale would not be invalidated by reason only of its being for a larger arrear of taxes than was really due."

He thus recognizes that selling for too much is not a matter of procedure, and while expressing his individual opinion as not in agreement with the tendency of other decisions, he is referring to the equivalent of sec. 156; had sec. 155 only been in question, he might probably have expressed a different opinion.

This excess was clearly never imposed as a tax. "The Legislature * * could not have meant that his land might be sold for any amount of taxes the treasurer chose

to impose upon them * * The amount of the excess can make no difference whether it is 5s. or £5." per VanKoughnet, C., in *Yokham v. Hall*, 15 Gr. 336. I do not think the maxim *de minimis non curat lex* applies. The subject in question is the lot of land, not the excess of assessment, although Mr. Spragge, when Vice-Chancellor, seems to have thought the maxim might, in some cases, apply. But the tax balance unpaid itself was originally only \$2.30, and twenty cents was about one-eleventh of the amount. In *Irwin v. Harrington*, 12 Gr. 179, the excess was about one-eleventh, and in such cases the proportion should rather be looked at than the actual amount, if the maxim can be applied at all.

The other objections do not seem of so much force, and are probably cured by sec. 155, as being matters of procedure. The evidence shewed that the treasurer of the county furnished to the clerk of the township in 1881, a list of all the lands liable to be sold which included this lot 19. The clerk kept it for inspection and gave a copy to the assessor, and the assessor returned it with the assessment roll to the clerk. The assessor did not return it as occupied, nor did the clerk return it to the county treasurer as occupied, and he thought it was unoccupied while in fact it was occupied. The assessor returned some lots as occupied, but not this one. In *Bank of Toronto v. Fanning*, 18 Gr. 391, in which the two years had not expired, the sale was held valid where an occupied lot had been returned as unoccupied. To the same effect is *Silverthorn v. Campbell*, 24 Gr. 17.

In *Fenton v. McWain*, 41 U. C. R. 239, Wilson, C. J., appears to have said at p. 245, that returning resident land as non-resident was cured by 32 Vic. c. 36, s. 155, (O.), because two years had elapsed from the sale. But in *Bank of Toronto v. Fanning*, 18 Gr. 391, it was cured though two years had not elapsed.

The clerk of the municipality in this case did not examine the assessment roll when returned by the assessor as required by section 111, but that, I apprehend, is a matter

of procedure. If returning an occupied lot as unoccupied does not vitiate a sale, then the neglect to examine the roll to see if a lot has become occupied should not vitiate it.

In *Yokham v. Hall*, 15 Gr. 336, and *The Edinburgh Life Assurance Co. v. Ferguson*, 32 U. C. R. 253, and *Beckett v. Johnston*, 32 C. P. 301, and *Fleming v. McNab*, 8 A. R. 656, the defects that vitiated the sales were the assessment of distinct parcels together, so that the amount assessed against each could not be ascertained—there was no original legal assessment.

In the present case the assessment was perfectly legal, but the amount for which it was sold was in excess of the assessment.

It is said that the plaintiff was present at the sale for taxes, and in fact purchased some lots, and should not now be heard to complain. It is proved that he was present and purchased one lot, which was ten or eleven ahead of lot 19 on the list, and another, three below it on the list, and the treasurer says that fifteen or twenty minutes elapsed between these two lots bought by the plaintiff. The plaintiff says he attended the sale, and bought one or two lots for his brother, that he did not know the lot now in question was sold at that sale. As it is not shewn that he was present when this lot was sold, I do not think he is estopped by conduct from complaining of it.

It was also said that the plaintiff was informed within three months after the sale of the lot having been sold, and he might thus have redeemed within the year, before a deed could be executed. The township clerk says he saw the plaintiff within three months of the sale and told him of it, *i. e.* in January 1882. The plaintiff says he first heard of the sale last fall, (1884). That in January, 1881, before the assessor got his book, he saw the clerk, who told him he thought there were arrears on the lot, and that Black the assessor would let him know. He afterwards saw Black who told him this lot was not in his list of lands liable to be sold. The clerk has probably mistaken the

time he saw the plaintiff. But if the plaintiff has otherwise the right to impeach the sale, I do not think that his knowledge of its having taken place within the time he might have redeemed, should now deprive him of his right of action.

The purchaser at the tax sale was Schuyler Shibley, and he, on the 6th of October, 1884, made a voluntary conveyance to his son the defendant Henry T. Shibley, which was mislaid, and another was executed on the 10th of November, 1884, and registered the following day. This suit was begun on the 14th of October, 1884. So that the defendant cannot claim any protection from R. S. O. c. 95, sec. 11, if he would not in any event be prevented from claiming it under sec. 12.

The defendant, H. T. Shibley, on October 6th, 1884, made a lease to one Brouse to commence March 1st, 1885, for three years, and if the sale be set aside claims to be indemnified against his covenants in the lease, and the defendants claim to be paid what was paid for the purchase of the lands, and in obtaining a conveyance, and the value of improvements made by them, and damages for loss of time, trouble and expenses incurred by them.

The defendants are entitled to be paid the amount paid for taxes, interest and expenses: *McKay v. Ferguson*, 26 Gr. 236.

The evidence of any improvements is very slight, and the amount at most, as placed by the defendants themselves, is \$20. I do not think the evidence showed they were of such a permanent character as to entitle the defendants to be paid for them.

As to the lease, I do not think I am in a position to deal with it. The tenant is not before the Court. It may be that he may be entitled to hold the lease, and if so the defendant will suffer no damage. This decree does not decide anything against the tenant.

The plaintiff is entitled to a decree setting aside the sale and subsequent deeds and to his costs. He offered to pay the defendants \$50, a sporting offer as it was called, and

which is more than the defendants' costs, improvements and expenses would amount to, which was refused: *Irwin v. Harrington*, 12 Gr. 179.

A. H. F. L.

[CHANCERY DIVISION.]

GRAHAM v. WILLIAMS ET AL.

Mechanics' lien — Tenant with right of purchase — Right of lien-holder to charge landlord's interest — Right of lien-holder as against mortgagees — R. S. O. ch. 120, secs. 2, 7.

G. supplied bricks to W., who had leased certain land from H. with an option of purchase. The contract for the supply of the bricks was made between G. and W., and on W.'s credit, although H. was aware that they were being supplied, and that buildings were being erected on the land. These buildings were being erected by W. under a verbal agreement to that effect between W. and H. subsequent to the lease, and by which agreement H. had agreed to lend part of the money required for the buildings to W., advancing the same as the work progressed on the security of the property. W. did not exercise his right of purchase under the lease, and G. filed his lien against both W. and H., and brought this action to establish the same against the interest of both of them.

Held, affirming the decision of BOYD, C., that the interest of H. in the property was not charged.

It requires something more than mere knowledge of the work being done to bind the owner under R. S. O. ch. 120, sec. 2, sub-sec. 3. The privity and assent must be in pursuance of an agreement.

H. could in no sense be looked upon as a prior mortgagee and it is only against such that R. S. O. ch. 120, sec. 7 gives priority to the lien holder.

THIS was an appeal to the Divisional Court from the decision of BOYD, C., reported 8 O. R. 478.

The plaintiff now moved to set aside the said judgment, and to enter judgment for him, or for a new trial, on the grounds, set out in his notice of motion, that the said judgment was contrary to law and against the weight of evidence: that his Lordship erroneously held that the plaintiff was not entitled to a lien for the amount of his claim or

any part thereof on the estate of the defendant, John Heney, in the said lands or entitled to a lien on the said lands, to the amount by which the selling value thereof was increased by the materials furnished therefor by the plaintiff: that his Lordship erroneously held that the arrangement between the defendants Heney and Williams as to building on the said lands, was that of debtor and creditor, and not an agreement determining the option to purchase, whereby the defendant Heney, became, and was possessed only of a vendor's lien or claim for the purchase money as contended by the plaintiff: and to reform and vary the said judgment as against the defendant Williams, so as to declare that the plaintiff was entitled to a mechanics' lien, for the amount of his claims on the whole interest of the said defendant Williams in the said lands, or upon all his leasehold interest and right of purchase contained in the lease of April 21st, 1884, and referred to in the statement of the defendant Heney, instead of referring the same to the Local Master of this Court at Ottawa.

The motion was made on February 28th, 1885.

J. MacLennan, Q.C., for the plaintiff. The plaintiff claims in respect of bricks furnished by him. He claims that Heney was an owner, within the meaning of sub-sec. 3, of sec. 2, of R. S. O. ch. 120. The materials were furnished with the privity and consent of Heney, and the act applies to give the plaintiff a lien on the interest of Heney. At any rate Heney is mortgagee: *Ib.* sec. 7. The effect of what took place as to the new buildings was, that Heney waived the payment of \$1,000, and Williams became owner, and Heney mortgagee. Moreover the judgment should not have referred it to the Master to ascertain the extent of Williams's interest. That should have been decided by the Court, so that the lien might attach upon that, and the rights of Heney as to his advances should have been declared also. The plaintiff does not claim as a contractor or sub-contractor but as a person who furnished materials.

J. J. Gormully, for the defendant *Heney*. Mechanics Lien Acts should receive a strict construction: *Phillips* on Mech. Liens, sec. 14 *seq.* As to sec. 7 of R. S. O. c. 120, that only applies to mortgages existing before the work begins. "At his request" should be read before each of the alternatives in sub-sec. 3 of sec. 2 of R. S. O. c. 120. If the plaintiff's contention is right, the landlord who makes a lease containing a covenant to repair, would become liable to the workmen who did the repairs, by having his lands bound. In this case the payment of \$1,000 was a condition precedent to the exercise of the option to purchase. I refer to *Knapp v. Brown*, 11 Abb. Prac. Rep. N. S. 118; *Phillips* on Mech. Liens, 2nd ed., sec. 65, 67, 83; *Hullahan v. Herbert*, 11 Abb. Prac. Rep. N. S. 326; *Bank of Montreal v. Haffner*, 29 Gr. 319, 3 O. R. 183; *Richards v. Chamberlain*, 25 Gr. 402; *Currier v. Friedrich*, 22 Gr. 243; *Douglas v. Chamberlain*, 25 Gr. 288; *Broughton v. Smallpiece*, 25 Gr. 290.

May 21st, 1885. PROUDFOOT, J.—*Heney*, the owner in fee of certain property, made a lease to *Williams* for one year at a rent of \$280, with a right of purchase for \$5000, within the year, paying \$1000 down, and giving a mortgage for \$4000, payable in annual instalments for eight years, with interest at seven per cent. The term began on May 1st, 1884. There were two houses on the property and a part was vacant ground. In the end of May (a) a new bargain was made verbally, between *Heney* and *Williams*, viz., that *Williams* was to build two new houses on the property not to cost over \$6000 in all and *Heney* was to advance as the work proceeded two-thirds of the cost, and he was to have a mortgage on the property from *Williams* for \$4000, or whatever he advanced with interest. The buildings were gone on with and carried nearly to the top of the brick work, in August, and stopped there. The brick was furnished by plaintiff, and he seeks to establish

(a) The lease was dated April 21st, 1884, and the term was to begin from May 1st.

a lien not only on the interest of the tenant but of the landlord also.

R. S. O. ch. 120, sec. 2 sub-sec. 3 defines an *owner* as including a person having any estate legal or equitable in the lands upon which the materials are furnished at whose request, and upon whose credit, or on whose behalf, or with whose privity or consent, any such work is done. And it is said that here the work was done with the privity and consent of Heney. But I think it requires something more than mere knowledge of the work being done to bind the owner. The privity and assent must be in pursuance of an agreement. For otherwise a reversioner after a long lease might be held bound by the contracts of the tenants if he saw and did not disapprove of the building being erected by the tenant.

The plaintiff then contended that the option to purchase had been in fact exercised, and that Heney had waived the cash payment of \$1000, required in that case. It is rather difficult to understand the exact position of the parties. But there were really two agreements. One for the lease and the option to purchase, another for the erection of the two houses. All parties seem to have thought the option to purchase would be carried out; when Heney would be entitled to the \$1000 and a mortgage for \$4000. Both Heney and Williams say that agreement subsisted while they were arranging for the erection of the buildings. Then this second agreement was made by which Williams was to put up the buildings and Heney was to advance two-thirds of the cost, or \$4000, for which he was also to have a mortgage. Had the buildings been completed Heney would have been entitled not only to the \$1000 in cash and a mortgage for \$4000, but also to another mortgage for \$4000 for money to be advanced. This was an arrangement by which Williams was to become the owner of the property and the buildings were to be put up for his benefit. But I do not think it was in the contemplation of either of the parties that the payment of the \$1000 as the condition for the exercise

of the option was to be waived, though they do not seem to have considered, or provided for the contingency that has occurred of Williams not being able to carry out the purchase. He has not paid the \$1000, nor can the money spent by him on the buildings be looked upon as that payment—the amount was about \$1000—for it was spent under the other agreement.

Heney made no contract or agreement with Graham. Williams alone contracted with Graham. Heney no doubt knew of the brick being bought from Graham, and in one instance he gave Williams \$250 to pay to Graham on account of the bricks, but that was part of the advance he was to make to Williams, and Mr. Christie notified Graham about the 13th of August that Heney was not responsible at all for any of the bricks, and would not accept any order from Williams for them, and at this time there was not more than \$69 due to Graham.

At this time then I think that Heney must be considered as the landlord, and Williams the tenant, and Heney might claim the protection of s. 6, ss. 2 of the Act—that his reversion was not bound as he had not signified his consent in the manner pointed out by that section.

The plaintiff contended also that if Heney was not the owner he was mortgagee. The seventh section of the Act, however, gives the mechanic, &c., a lien against *prior* mortgagees. Any right that Heney could acquire by virtue of the agreement for mortgage, and of the advances made under it, was based upon the security not only of the land but of the work done. The plaintiff claims a preference by virtue of the statute and the right cannot go beyond the terms of the Act. The Act gives priority to the lien to the extent of the increased value over a mortgage existing or created before the commencement of the work. Heney's right only accrued as advances were made by him, and his advances were made as the work progressed, so that he can in no sense be looked upon as a prior mortgagee. If it be necessary to shew that Heney had no notice of the lien, I think the evidence sufficient

to exonerate him. He knew that bricks were being furnished, but he was advancing money to pay them and had a right to assume it was so applied ; and the plaintiff had notice that he declined to become responsible for them : *Richards v. Chamberlain*, 25 Gr. 402. Though I still think it questionable, as I did in *Douglas v. Chamberlain*, 25 Gr. 288, whether mortgages under deeds executed during the progress of the work would be affected by any notice.

The plaintiff also contended that the decree was wrong in referring to the Master to ascertain the extent of Williams's interest. This is a matter that might have been decided, no doubt, at the hearing. But it was also quite competent for the Court to refer it to the Master. Questions of a similar kind are frequently referred to the Master in partition suits.

I think the judgment right, and that it should be affirmed, with costs. See *In re Craig*, 3 C. L. T. 501 ; *Phillips* on Mech. Liens, 2nd ed., s. 246.

FERGUSON, J.—Upon examination of the evidence, arguments, and authorities, I think this a plain case, and I concur in the judgment of Mr. Justice Proudfoot, affirming the judgment of the Chancellor.

A. H. F. L.

[CHANCERY DIVISION.]

THE REAL ESTATE LOAN COMPANY OF CANADA (LIMITED)
V. THE YORKVILLE AND VAUGHAN ROAD COMPANY
ET AL.

*Conveyance in fraud of creditors—"Creditors"—Accrual of right of action
—Locus standi—13 Eliz. ch. 5.*

The plaintiffs sought to set aside a certain conveyance dated February 27th, 1880, and made by M. to G. as executed in fraud of themselves as creditors. It appeared that the plaintiffs had not recovered judgment for the debt in respect of which they claimed to be creditors until July 23rd, 1883, and that this was a judgment recovered in an action on a covenant as to the validity of certain mortgages purchased by them from M. contained in a deed of March 1st, 1880, by which the said mortgages were conveyed by M. to them. The plaintiffs, however, sought at the trial of this action to give evidence that this deed of March 1st, 1880, was made in pursuance of an agreement for the purchase of the said mortgages entered into by themselves with M., before January 1st, 1880, and that this agreement was induced by certain misrepresentations made by M. as to the validity of the said mortgages. It appeared, however, that the consideration of the purchase was to be the transfer of certain shares in the capital stock of the plaintiffs' company to M., and that these shares were not actually so transferred until after February 27th, 1880, and the evidence so sought to be given was excluded.

Held, per FERGUSON, J., that the liability of M. only began at the time of the execution of the covenant in the deed of March 1st, 1880, and inasmuch as the impeached conveyance was antecedent to this, and it was not shewn that there were at the date of it any existing debts, nor that it was intended to defeat any future debt, the plaintiffs must be nonsuited.

Held, on appeal, per BOYD, C., that since the plaintiffs did not really become creditors of M. until they recovered judgment, the legal and only position of the plaintiffs was that of subsequent creditors, and as it was not pretended that the impeached conveyance was given with a view to defeat subsequent creditors, the plaintiffs had no *locus standi* to recover under 13 Eliz. ch. 5, even if the impeached conveyance was held to be of a voluntary character, as to which *quære*. It was altogether illusory to endeavour to trace back the origin of the plaintiffs' claim to the alleged misrepresentations which were not acted upon until after the impeached conveyance, and moreover whatever cause of action the plaintiffs then had, they did not prosecute it, or become creditors in respect of it. The judgment below was therefore right.

Per PROUDFOOT, J.—Though an action for damages could not be brought until the damage occurred, yet if the original agreement for the purchase of the mortgages was based on misrepresentations of M., the plaintiffs' right dated from the agreement. It was not necessary for the plaintiffs to be creditors, it was sufficient for them to have a right of action. Therefore the exclusion of the evidence offered by the plaintiffs as aforesaid, and the judgment of the Court below was wrong.

Held, also, per PROUDFOOT, J., that on the evidence adduced, the conveyance impeached appeared to have been a voluntary one.

THIS was an action brought by the Real Estate Loan Company of Canada (Limited) against the Yorkville and Vaughan Road Company, the Metropolitan Permanent Building Society, and the Corporation of the City of Toronto, with a view to realizing the amount of a certain debt due to the plaintiffs under a judgment recovered by them against the Metropolitan Permanent Building Society.

The statement of claim set up that the plaintiffs were a loan company, incorporated on June 16th, 1879: that the Yorkville and Vaughan Road Company were incorporated on January 7th, 1880, for the purpose of purchasing, as their charter alleged, from the Metropolitan Permanent Building Society a road then owned by the latter, called the Yorkville and Vaughan Plank Road: that the Metropolitan Permanent Building Society were formerly holders of certain mortgages, including one on the said Plank Road: that the Corporation of the City of Toronto had appropriated the Plank Road, and were liable to pay the owners \$2,300 therefor: that about September, 1879, the plaintiffs agreed with the Metropolitan Permanent Building Society to take over all the assets of the said Society with the exception of the Plank Road for valuable consideration, which was based upon certain representations of the Society that the mortgages were valid and subsisting securities: that thereupon and before the incorporation of the defendants, the Yorkville and Vaughan Road Company, the Society assigned to the plaintiffs by indenture dated March 1st, 1880, their said mortgages, except the Plank Road property (a): that afterwards the plaintiffs discovered that the representations above referred to were untrue, whereupon they brought an action against the Society, and on July 23rd, 1883, recovered a judgment for \$834.77, which was still in full force: that though writs of *fi. fa.* had been placed in his hands, the Sheriff had not been able to make anything out of the goods and lands of the Society in satisfaction of the judgment: that at the time when the

(a) This conveyance contained a covenant as to the validity of the mortgages.

Society incurred the liability in respect of which the judgment was recovered they were the holders of the mortgage on the Yorkville and Vaughan Plank Road, and inasmuch as they had agreed to dispose of all their other assets to the plaintiffs, they determined to form a company for the purpose of working the Plank Road and realizing a profit upon the said asset, and for the purpose of placing this their only remaining asset in such a shape that it could not be rendered available to meet any claim or demand of the plaintiffs or other creditors of the Society: that for the purpose of carrying out this project the members of the Society formed themselves into another company, and had themselves incorporated under the name of the Yorkville and Vaughan Road Company, the above-named defendants, on January 7th, 1880: that since that time the Yorkville and Vaughan Road Company, then and still being identical in membership with the Society, had worked the Plank Road, and collected tolls and derived large profits: that the Corporation of the City of Toronto having appropriated the Road as above mentioned would pay the Yorkville and Vaughan Company the sum of \$2,300 as agreed unless restrained; that the Society owned and possessed the Yorkville and Vaughan Plank Road at the time when the said liability to the plaintiffs was incurred, and this property was and is the only available asset of the Society to which the plaintiffs could look for payment of their judgment debt: that the Yorkville and Vaughan Road Company were in fact trustees for the Society, and the Society were beneficially entitled to the moneys payable by the City of Toronto: that the Society by deed dated February 27th, 1880, conveyed to the Yorkville and Vaughan Road Company the said Yorkville and Vaughan Plank Road, and by such conveyance had hindered and delayed the plaintiffs in the recovery of their debt: and the plaintiffs claimed an injunction restraining the Corporation of the City of Toronto from paying over to their co-defendants so much of the \$2,300 as would satisfy the plaintiffs' judgment debt and costs, and that they might be ordered to pay the said sum to the plaintiffs: that it might

be declared that notwithstanding the change of name by the Society the moneys payable by the said Corporation to the Yorkville and Vaughan Road Company as trustees or otherwise were applicable in payment of the debt incurred by the Society: that the deed of conveyance from the Society to the Yorkville and Vaughan Road Company might be set aside as against the plaintiffs: that if necessary a receiver might be appointed, and for costs, and general relief.

It appeared that the Plank Road in question had, before the Society became the owners of it, been owned by a company named the Yorkville and Vaughan Plank Road Company, and that it was under certain mortgages which the said company had given to the Society upon the said road and franchises of the company, and by foreclosure of such mortgages, that the Society became the owners of the road; and also that for the securities which the plaintiffs agreed to purchase from the Society they agreed to give to each shareholder of the Society a number of the shares of their capital stock equal in number to the shares such shareholder held in the Society.

For the rest the allegations in the statement of claim may be taken as correct for the purposes of the present report, subject to the facts mentioned in the judgments.

The action was tried at Toronto on December 1st, 1884.

Z. Lash, Q.C., and *A. Galt* for the plaintiffs.

McMichael, Q.C., and *A. Hoskin*, Q.C., for the Yorkville and Vaughan Road Company.

Ritchie, for the Metropolitan Permanent Building Society.

McWilliams, for the City of Toronto.

At the close of the plaintiffs' evidence, *McMichael*, Q.C., moved for a nonsuit.

FERGUSON, J. A Judge called upon to deliver judgment upon a motion for nonsuit or a motion of this kind upon the evidence of the plaintiffs, when it may be that the defence, after hearing the judgment, will desire to give evidence, is placed in an unfavourable position because he has to deliver his judgment immediately. Where the case is complicated this is often found a great difficulty. But I do not think that I find myself in any serious difficulty in the present case. As regards the branch of the case that seeks to set aside the conveyance from the Metropolitan Permanent Building Society to the Yorkville and Vaughan Road Company, I am of opinion that the plaintiffs fail. I think the beginning of the liability of the Metropolitan Permanent Building Society to the plaintiffs was the time of the execution of the covenant (b). That liability ripened when the breach occurred. Perhaps this was a covenant, which was broken as soon as made. I do not know how the exact facts are, but I suppose it was like a covenant for title that was false, and no sooner made than broken. I cannot accede to the ingenious argument of Mr. Lash that liability existed before that time. I think there was no liability in regard to that matter before the execution of that covenant. The conveyance sought to be impeached was a conveyance before that time. It was not shown that there was any debt then existing. There may have been the eight or ten dollars spoken of by one of the witnesses, but that does not at all fill the requirements as laid down by May on fraudulent conveyances, because, speaking of trifling debts, he says they must be of such an amount that they would be reasonably presumed to have been a motive for making the conveyance (c). I am therefore safe in saying that no debt, available for the purposes of the contention, has been shown here to have existed at the time that this conveyance was executed. Then the conveyance could not have been executed with the intention of defeating any then creditors of the grantors. I think the case is far from falling under the doctrine of *Buckland v. Rose*, 7 Gr. 440. There are no premises from which I can conclude that this conveyance was made with a view of getting the property away from this then future debt or from any then future creditors. I think that is an

(b) Sc. In the deed of March 1st, 1880, as to the validity of the mortgages.

(c) *May on Fraudulent Conveyances*, pp. 36-37.

element necessary to be shown in such cases. It has been said by counsel that it was not necessary that this should be shown, but that it may be presumed. I am not aware that the law goes as far as that. I think what I have just mentioned is the leading element in such cases so far as I recollect them. Taking, then, the different ways in which this case is put: In the first view that the conveyance was made for the purpose of defeating, hindering, or delaying the then creditors of the grantors, the case entirely fails. In the other view in regard to creditors there might be in the future, I think it fails also. The third and only other ground on which the case is put by the plaintiffs is, that the Yorkville and Vaughan Company are trustees for the execution debtors, the Metropolitan Company. The effect of this statement is to say that notwithstanding all that is shown here to have occurred as to those two companies, the property is still the property of the Metropolitan Company. Now, I think that the Yorkville and Vaughan and the Metropolitan have been shown here to be two distinct companies. The Metropolitan, I think, still exists. The Yorkville and Vaughan also exists. There has been a transfer of the property from one to the other, and I do not see why that transfer is not valid. Although the Yorkville and Vaughan was brought into existence for a purpose which is not patent here, it is yet a company; it is a person in the eye of the law, and the property has been transferred to it. The other company exists. The Yorkville and Vaughan owns the property, and the Metropolitan does not, and I think the Yorkville and Vaughan got the property for a consideration. The companies, I think, are not identical, as was contended. I do not see how they can be. I do not see how a trust such as is argued for by Mr. Lash could be carried out, owing to the want of identity of the shareholders in the respective companies; but apart from that, I do not think that the transaction shows the trust contended for. I am of opinion that the property is the property out and out of the Yorkville and Vaughan Road Company, and is not the property of the Metropolitan Permanent Building Society. There will be judgment for the defendants on the present motion, with costs.

Afterwards, on February 25th and 26th, 1885, the plaintiffs moved by way of appeal before the Divisional Court.

Amongst other grounds stated in the notice of motion was the following:—“The evidence shews that at the time the said Society incurred the liability which formed the subject matter of the judgment subsequently obtained by the plaintiffs against them the said Society owned the Yorkville and Vaughan Plank Road, and that by disposing of it to the defendants, the Yorkville and Vaughan Road Company, by the deed dated February 27th, 1880, they divested themselves of their sole remaining asset, and have thereby hindered and delayed the plaintiff in the recovery of their said debt, and therefore the said deed to the defendants, the Yorkville and Vaughan Road Company, ought to have been set aside as against the plaintiffs.”

Lash, Q.C., and *A. Galt*, for the plaintiffs. The plaintiffs were really creditors prior to the transfer of the road. The judgment at law was based on the covenant in the deed of March 1st, 1880, but in substance it existed from 1879, though for a different cause of action. The cause of action in the plaintiffs arose before the transfer to the Road Company. We refer to *Irwin v. Freeman*, 13 Gr. 465; *Bump* on Fraudulent Conveyances, 3rd ed., p. 503; *Freeman v. Pope*, L. R. 5 Ch. 538; *McKay v. Douglas*, 14 Eq. 106; *Fleury v. Pringle*, 26 Gr. 67,

McMichael, Q.C., for the Yorkville and Vaughan Road Company, referred to *Morawetz* on Priv. Corp., secs. 212, 573, 587, 597; *Brice* on Ultra Vires, 2nd ed., pp. 709, 723, 727; *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, 1 Eq. 318; *In re Empire Assurance Co.*, 4 Eq. 341; *Clinch v. Financial Corporation*, L. R. 4 Ch. 117; *Merchants' Bank v. Clarke*, 18 Gr. 594; *Brett v. Clouser*, 5 C. P. D. 376.

Ritchie for the Metropolitan Permanent Building Society.

February 27th, 1885. BOYD, C.—It is elementary law that a voluntary conveyance of land by a person not indebted at the time and not intending a fraud, is good as against subsequent creditors. When the defendants made

the impeached conveyance they owed but little, and what little they owed they paid off shortly afterwards, and had still ample assets left, which they afterwards transferred to the plaintiffs. The plaintiffs were not then creditors, and did not really become creditors till they had recovered judgment against the defendants. It appears to me to be altogether illusory to endeavor to trace back the origin of the claim to alleged misrepresentations as to the value of their mortgages made by the defendants prior to the impeached conveyance. Granted that such misrepresentations were then made, there was no acting on those misrepresentations by the plaintiffs till they transferred the stock which represented the consideration given for the securities received from the defendants, and that was subsequent to the impeached conveyance. No cause of action would in any aspect of the case arise till then, and whatever cause of action the plaintiffs then had they did not prosecute it, and they never became creditors in respect of it. It is an abuse of language to call the plaintiffs prior creditors in these circumstances; their legal and their only position is that of subsequent creditors. No evidence is given, nor is it pretended that the impeached conveyance was made with a view to defeat subsequent creditors, and failing that, the plaintiffs have no *locus standi* to recover under the 13th Eliz. c. 5. It would be possible to contend that the plaintiffs had some sort of case if they had proved an intention to deceive on the part of the defendants before the impeached conveyance, and that such conveyance had been made with a view to escape the consequences of such deception, and to protect the defendants in case the plaintiffs fell into the trap designedly laid for them. But all these elements of fraud are wanting in the present case. I am not at present satisfied that the transfer of the road to the Yorkville Company, and their dealing therewith can be regarded as of a voluntary character, so as to entitle the plaintiffs to follow that asset, but it is not needful to dispose of the appeal on this ground. I think the judgment should be affirmed.

PROUDFOOT, J. There are two questions material to be considered in this case, viz : Was there any consideration for the transfer to the Yorkville and Vaughan Road Company and if there was not, were the plaintiffs creditors prior or subsequent to the transfer ?

It seems that the Metropolitan Building Society had a mortgage upon the road and franchise made by the Yorkville and Vaughan Plank Road Company, and default having been made in payment of the amount secured, the Metropolitan Building Society foreclosed the mortgage, and became thus absolute owners of the road and the franchise.

The Metropolitan Building Society then negotiated with the plaintiffs for the sale to them of their mortgages, and did enter into an agreement for that purpose. They also endeavoured to sell to the plaintiffs this asset of the road and franchise, but the plaintiffs would not purchase.

As a difficulty was apprehended in carrying on the road under a building society charter, the members of the Metropolitan Building Society constituted themselves The Yorkville and Vaughan Road Company under the general Act for that purpose. The Building Society then transferred the road to this company, the shareholders of the Building Society, who were also shareholders in the Road Company, getting from the Road Company a nominal equivalent of paid up shares in the Road Company for the shares in the Building Society. The Building Society then ceased to have any assets and discontinued business.

I think it probable that we must view this as a transaction between two companies, composed of the same individuals, but having a separate corporate existence. Assuming that when the Building Society transferred the road to the Road Company and discontinued operations, it would, as was argued by Dr. McMichael, become a trustee of whatever consideration it got from the Road Company for the shareholders of the Building Society, the consideration for the transfer was these paid up shares. They must therefore be treated as given to the Building Society and transferred by it to the shareholders in the Road Company, who were its own shareholders.

It would appear, therefore, that the Building Society transferred the road, and got back what was presumably the equivalent in road shares, and nothing more; and it was left just as it was before the operation, so far as value was concerned, and the Building Society really got no consideration for the transfer.

But it was said that the change of the stock from Building Society stock to Road Company stock formed a consideration for the transfer. It is true that the constitution and functions of a Road Company are different from those of a Building Society, but the question, whether it formed a consideration for the transfer, is one of evidence. If it should appear that the Road Company was not a valuable acquisition, but the contrary, if instead of having stock upon which at least no liability could be incurred, it should turn out that they were acquiring a liability instead of an asset, this could not be considered a valuable consideration. There is no evidence upon this point, except the statement of counsel for the Road Company, who was himself a shareholder, that his position was rendered worse by the transfer. I am of course dealing with a case in which the shareholders are identical, and the transaction is just shifting money or its equivalent from one pocket to the other. I apprehend, therefore, that the transfer was a voluntary one.

Then at what time did the right of the plaintiffs accrue? It was treated by the learned Judge as not having accrued earlier than the date of the deed of transfer of the mortgages to the plaintiffs, containing a covenant as to the validity of the mortgages, about 10th of March, 1880.

But negotiations had been entered into for this transfer as early as September, 1879, and it is alleged that they were perfected before January 1st, 1880, but that evidence of this was practically excluded at the hearing. The deed subsequently executed refers to a prior agreement, and though the plaintiffs admitted a number of shareholders of the Building Society to be shareholders in this company in January, the stock of the plaintiffs was not in fact transferred to these shareholders till the time of the execution

of the deed. It is dated March 1st, but seems not to have been signed till some days after, probably the 10th, the consideration for the transfer to the plaintiffs being the allotment of shares in the plaintiffs' company to the shareholders in the Building Society.

I do not think this is the true test. Of course an action for damages could not be brought till the damage occurred. But was there the basis on which an action could be brought? What was offered to be proved was the existence of an agreement which the plaintiffs could have enforced against the Building Society, to compel it to assign its mortgages, and that might be enforced by the Building Society to compel the plaintiffs to assign their shares.

It was offered to be proved, also, that this agreement was based upon the representation of the Building Society, of the goodness of the mortgages, and that this was mistaken, as some were not valid.

If the plaintiffs were able to establish that agreement and that representation, then the date of the plaintiffs' right would not be that of the deed made in pursuance of the agreement, but the date of the agreement itself. Mr. Bump lays it down (p. 507) as a general rule that all claims which arise from contract are in force from the date of the agreement, although no demand accrues until a subsequent date. He cites a number of instances, such as a covenant with a general warranty, a bond of conveyance, &c., that take effect from the date of the instrument.

In these cases no action would lie till the damage accrued, but the plaintiffs' right antedates that. Among other instances he cites a case showing that a demand arising from a tort is in force from the time of the commission of the wrong, and misrepresentation is a tort. He also says that evidence may be introduced to show that a judgment is founded on a prior claim; and if that can be done in the case of a judgment, it would seem it might be done in case of a deed.

The plaintiffs do not require to be creditors. It is sufficient if they have a right of action.

[CHANCERY DIVISION.]

MAGEE V. KANE.

Contract of sale—Statute of Frauds—Purchase by tenant—Change in character of possession as evidence of part performance—Evidence of such change—Part payment of purchase money—Parol contract.

Where a person came into possession of real estate as tenant, and it was shown unequivocally, viz., by part payment of the purchase money evidenced by the receipt in terms therefor, that his tenancy was afterwards relinquished, and that his possession, being changed in character by parol contract to purchase, was continued as that of a vendee, *Held*, that the possession thus changed, was such part performance as took the contract for sale out of the Statute of Frauds.

THIS was an action brought by Charles Magee against James Kane, claiming specific performance of a certain contract for the sale of lands to the defendant for the price of \$700, payable \$100 at the time of sale, and the balance at the option of the purchaser at any time within ten years from the date of sale, with interest at six per cent. per annum on the balance of unpaid purchase money to become due and be paid half yearly.

In his statement of claim, the plaintiff alleged that the said contract was expressed in writing which was handed to the defendant, but was not signed by the latter; but that in part performance of the said contract, \$100 of the purchase money had been paid by the defendant at the date of sale, which was in October, 1875, and the latter had thereupon entered into possession and receipt of the rents and profits, which he still retained, and that some interest also had been paid on the unpaid balance of purchase money.

The defendant denied the acts of part performance and claimed the benefit of the Statute of Frauds.

The action was tried at Ottawa, on December 2nd, 1884, before Boyd, C.

It appeared from the evidence of one Clarke, the agent of the plaintiff, that the defendant had prior to the alleged purchase been for some ten years tenant of the lands in question: that at the time of the sale in October, 1875,

which was in the terms alleged in the statement of claim, he paid \$100 of the purchase money, and that afterwards, in January, 1877, he made a payment of \$18 on account, of interest; and that the defendant had been in possession of the lands by tenants of his since the purchase; and receiving the rents and profits.

The defendant adduced no evidence.

The receipt for the \$100 paid by the defendant was produced by him and was as follows:

"Received from Mr. James Kane the sum of one hundred dollars on account of purchase south half lot number seven, west side Nicholas Street."

\$100.	(Sgd.)	A. MAGEE, Adm. Est.
Ottawa, 19th October, 1875.		N. SPARKS, Jr.,
		per Jas. Clarke.

The learned Chancellor gave judgment for specific performance on the terms sworn to by the witness Clarke, but directed that judgment should be arrested until the sittings of the Divisional Court or the Court of Appeal.

On February 27th 1885, the defendant moved by way of appeal before the Divisional Court.

W. Cassels, Q.C., for the defendant. The only evidence of possession there is here, was referable to a continuance of a prior tenancy, and nothing more. Besides to take a case out of the Statute of Frauds, the acts of part performance must be by the party seeking to enforce the contract. I refer to *Campbell v. McKerricher*, 6 O. R. 85; *Alderson v. Maddison*, 7 Q. B. D. 174, 8 App. Cas. 467; *Conner v. Fitzgerald*, 11 L. R. Ir. Ch. 106; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Humphreys v. Green*, 10 Q. B. D. 148; *Britain v. Rossiter*, 11 Q. B. D. 123; *Roscoe's Nisi Prius*, 15th ed., Vol. 1, p. 291; *Lord Desart v. Goddard*, Wallis & Lyne's R 347.

J. J. Gormully, for the plaintiff. The receipt came from the custody of the defendant, and it shows that the \$100 was paid as part of the purchase money. After giving it the plaintiff could no longer have distrained for rent. See *Fry on Spec. Perf.*, 2nd ed., secs. 557, 559.

W. Cassels, Q.C., in reply referred to *Cameron v. Spiking*. 25 Gr. 116; *Fry* on Spec. Perf., 2nd ed., secs. 578-9.

May 21st, 1885. *BOYD, C.*—In *Lincoln v. Wright*, 4 DeG. & J. 16 (1859), Knight Bruce, L.J., concedes that in general, when a man holding the actual possession of land as tenant, under a landlord, enters into a verbal agreement for purchasing the land, the mere circumstance that under the agreement the defendant continues in possession does not amount to part performance. But, as he shows in the context, if there is any other fact or act proved which establishes a change in the character of the occupancy then the continuance in possession, coupled and explained by that further fact, is such part performance as justifies the Court in receiving all the evidence that is offered upon the transaction, and thereupon granting or refusing specific performance according to the merits of the case.

Precisely the same result is reached by *Baggallay, L.J.*, in *Humphreys v. Green*, 10 Q. B. D. at p. 155, where, quoting from *Alderson v. Maddison*, 7 Q. B. D. 174, he affirms the proposition of law thus stated: "The continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase from the landlord, for it is equally consistent with a right depending on his tenancy;" but he is clearly of opinion (following the principle of decision in *Nunn v. Fabian*, L. R. 1 Ch. 35), that if there was besides payment and acceptance of a portion of the purchase money made in respect of that particular land, then such part performance would displace the statute.

Nunn v. Fabian was a case in which a tenant in possession made a parol agreement with his landlord for an extended lease at an increased rent, and being in possession he made one payment of the increased rent. This Lord Cranworth held was an act of clear part performance, and therefore he enforced the contract. As a consequence of these and other decisions it is laid down in *Dart on Vend.*

and Purch., 5th ed., p. 1025, as well settled law, that if the acts relied on are sufficient for the purpose, and are such as can only be referred to the parol agreement, the mere circumstance that the tenant was already in possession is not material.

Nunn v. Fabian was approved of by Malins, V. C., in *Williams v. Evans*, L. R. 19 Ex. 554, and was relied upon as law in the Court of Appeal, in *Orr v. Orr*, 21 Gr. 397. Its authority was vindicated and followed by Chatterton, V. C., in a very elaborate judgment (in which most of the earlier stated authorities are collected) of *Conner v. Fitzgerald*, 11 L. R. Ir. Ch. 106, (1883). Although the House of Lords was in a manner invited to pronounce upon this decision by the conflict of opinion among the Judges in *Humphreys v. Green*, 10 Q. B. D. 148, yet the law lords appear pointedly to have abstained from over-ruling it and kindred cases. It is not for us to assume to do (what has not been hitherto done though individual Judges have disapproved of it): namely, to treat *Nunn v. Fabian* as of no binding force. That case is, I conceive, authority for this position: if a person come into possession of property as tenant, it may be shewn by unequivocal facts that his tenancy was relinquished, and that his possession being changed by parol contract to purchase was continued as that of vendee. Such is the present case. The salient and primary fact is, that the defendant is found in possession of the plaintiff's property. That is to say, as put by Wigram, V. C., in oft-quoted language: "One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as shewing unequivocally that some contract has taken place between the litigant parties:" *Dale v. Hamilton*, 5 Ha. at p. 381. He does not say, "*the contract*," but "*some contract*," meaning some contract relating to the land. Thereupon evidence is admissible to explain the transaction, because, as put by Sir George Jessel, in *Ungley v. Ungley*, 5 Ch. D. at p. 890: "Possession by a stranger is evidence that there was some

contract, and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract in order that justice may be done between the parties." Sir George Jessel says: "possession by a stranger," implying that the delivery or taking possession is a *new fact* which of itself is sufficient part performance. But what if the possession is not a *new fact* but the continuance of a former state of things? You are then at liberty to shew that the retention of possession is not attributable to a former tenancy but to a subsequent purchase, and if you can shew this incontrovertibly by any new fact, then you change the character of the possession and it becomes referable to the new agreement, and so part performance of that contract is established. The new fact in *Nunn v. Fabian* was payment of increased rent evidenced by the receipt therefor: the new fact here is part payment of the purchase money, evidenced by the receipt in terms therefor produced by the defendant. There are, besides, subsequent payments of interest, but this one piece of evidence shews, unequivocally and conclusively, that the defendant has been allowed to retain possession and is now in possession as purchaser.

Thus is reached the conclusion that in October, 1875, there was a purchase of the place by the defendant from the plaintiff, by virtue and in pursuance of which the defendant is in possession. Although there was a continuance of the same visible occupancy by the defendant of the land, yet the character of his possession then changed; his tenancy ended and he occupied as purchaser. The proof of this state of facts is, to my mind, of as much moment and significance as if the tenant had formally given up possession as tenant, and had forthwith thereafter been formally reinstated in possession as purchaser. This continuance of possession under the newly created relationship between the parties was an act of part performance affecting the land, solely referable to the contract to purchase, operating by and against both, and to enforce which either one could be the actor.

Possession of the property is as pointed out by Sir Edward Fry, in his Treatise, 2nd ed., sec. 579, part performance both by and against the one in possession and the owner. The owner has allowed the stranger to do an act on the faith of the contract, *i. e.*, enter or remain on the land; the stranger has allowed the owner to do an act on the faith of the contract, *i. e.*, withdraw from the land. They are therefore both bound. *Cameron v. Spiking*, 25 Gr. 116, is no more than an affirmation of what was laid down by the Lords Justices in *Wilson v. West Hartlepool R. W. Co.*, 2 DeG. J. & S. at p. 485, to this effect, that a purchaser's being let into possession was sufficient part performance, whether the contract was sought to be enforced by him or against him. There is no inconsistency as was argued before us between that case and *Campbell v. McKerricher*, 6 O. R. 85, in which no proof was given of any act of part performance by the plaintiff referable to or affecting the land in dispute.

In the present case there is no doubt about the fact and the terms of the contract. Apart from the Statute of Frauds it is one which the Court would and should specifically enforce, and the statute being inapplicable when the matter does not rest merely in contract but on part performance, I am of opinion that the judgment already pronounced should be affirmed, with costs.

PROUDFOOT, J.—I have little to add to what the Chancellor has said.

The receipt for purchase money in 1875 may be considered as evidence of the termination of the tenancy, as the tenant could not be both tenant and purchaser in regard to the same piece of property at the same time.

The tenancy being thus shown to have terminated the remaining in possession is the part performance that takes it out of the statute. It could not have reference to the lease for that was extinguished, and it must, therefore, have reference to the only agreement between the parties, the contract of purchase.

There is only one sentence in the Chancellor's judgment to which I do not desire to assent, and that is the reference to *Campbell v. McKerricher*, 6 O. R. 85.

FERGUSON, J.—After having been at some pains in looking up the authorities cited, I am prepared to concur in the above judgment.

A. H. F. L.

[CHANCERY DIVISION.]

GRAHAM V. BOLTON.

Will, construction of—Conditional gift—Condition becoming impossible—Vesting—Gift over—Time of payment.

A testator bequeathed his chattels and \$1,500 to his widow. His estate he directed to be sold and the \$1,500 to be paid out of the proceeds. After providing for the investment of the estate, he proceeded: "the yearly interest accruing from the same to be paid over to my said wife yearly for the term of six years, or until my son shall become twenty-one; 5th. It is my will that the above-mentioned gifts and bequests to my wife shall be given to her in lieu of dower, and on the further condition that she will clothe, maintain, and suitably provide for my said son until he shall become twenty-one; 6th. It is further my will that on the coming of age of my said son, my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies; 7th. In case my said son should die before coming of age, then the money so remaining as above, and to which he would then be entitled, shall be paid over to my two eldest brothers." The son died under twenty-one.

Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death, the gifts were denuded of the condition.

Held, also, that the testator's brothers were not entitled to payment of the capital until the time at which the son would have attained the age of twenty-one if he had lived; and in the meantime the widow was entitled to the income.

ACTION by the executors for the construction of the will of the late Samuel Bolton, tried at London, before Ferguson, J., on the 30th May, 1885.

No evidence was taken at the trial, the will, which is set out in the judgment, being admitted by the parties. The authorities cited, are also mentioned in the judgment.

Jeffery, for the plaintiffs, the executors.

Meredith, Q. C., for the defendant Ann Bolton.

R. M. Meredith for the defendants James and Charles Bolton.

July 7, 1885. FERGUSON, J.—The action is brought by the executors, and is for the construction of the last will of the late Samuel Bolton. There is no question of fact whatever involved, and the case should have been disposed of without bringing it on as if for a trial of facts.

The will is as follows:

"I, Samuel Bolton, farmer, of the Township of Adelaide, County of Middlesex, and Province of Ontario, hereby make, publish, and declare this to be my last Will and Testament.

"1. I direct that my funeral expenses and just debts be paid by my executors out of my estate.

"2. I give and bequeath to my wife, Ann Bolton, the whole of my household utensils and furniture, together with the organ, &c. I also give and bequeath to my wife the sum of fifteen hundred dollars good and lawful money of Canada, to be raised and levied out of my estate in the manner hereinafter provided.

"3. It is my will that as soon as convenient after my death my farm of one hundred acres, held and owned by me under my late father's will, shall be sold by public auction to the highest bidder, after due and proper public notice by advertisement, and that my executors shall then pay over to my said wife Ann Bolton the above mentioned bequest or legacy of fifteen hundred dollars to her sole and only use.

"4. It is also my will that my horse, harness, buggy, and cutter shall be sold at the same time by my executors, and the whole of the unexpended balance of the proceeds of sale of my said farm, horse, harness, buggy, cutter, &c., together with any ready money in bank, and notes of which I may die possessed, shall be invested by my executors in some secure and safe investment, and the yearly interest accruing from the same to be paid over to my said wife yearly for the term of six years, or until my only son William Stannord Bolton shall become of the lawful age of twenty-one years.

"5. It is my will that the above mentioned gifts and bequests to my said wife shall be given to her in lieu of dower, and on the further condition that she will clothe, maintain, and suitably provide for my said son William Stannord Bolton until he shall become of the age of twenty-one years.

"6. It is further my will that on the coming of age of my said son, my executors shall pay over to him the whole of the principal sum of money remaining in their hands and under their control or investment after satisfying the above expenses and legacies.

"7. I also direct that in case my said son should die before coming of age, then the money so remaining as above, and to which he would then be entitled, shall be paid over to my two eldest brothers, James and Charles Bolton, in the proportion of two-thirds to James and one-third to Charles."

By the eighth and last clause the testator appointed the plaintiffs the executors of his will. The will bears date the 11th day of October, 1883. The testator died on the 17th day of October, 1883. The will was proved by the plaintiffs on the 20th day of November, 1883.

The testator's son named in the will was born on the 16th day of September, 1871, and he died on the 28th day of June, 1884.

The plaintiffs have complied with the provisions and carried out the directions contained in the first, second, third, and fourth paragraphs of the will, and before the death of the testator's son, William Stannord Bolton, had invested upon mortgage a large sum of money, and have now in their hands a considerable sum which they have received as interest upon the investment and upon other moneys, and are ready and willing to pay the same to the defendant Ann Bolton, as in the fourth paragraph of the bill directed, but the defendants James Bolton and Charles Bolton, who are the brothers of the testator named in the will, have forbidden such payment, and they claim that they are, under the provisions of the sixth and seventh paragraphs, entitled to be paid the said interest and all the moneys in the hands of the plaintiffs, which they have received as executors of the estate, and the defendant Ann Bolton, the widow of the testator, has demanded from the plaintiffs payment to her of the said interest, and claims to be entitled to be paid the same and all the interest accruing from the said investments and moneys for the period of six years from the death of the said Samuel Bolton, the testator. She makes this claim under the provisions of the fourth and fifth paragraphs of the will. In argument it was contended that the widow is entitled to the interest of the fund till the time at which

the son would, if living, have attained the age of twenty-one years.

The contention in favour of the widow was, in effect that the gifts to her of the furniture, &c., and the \$1,500 and the interest arising on the balance of the estate until the son should attain twenty-one, were absolute gifts, and were charged with the support of the son; that when the son died the charge ceased, and that she has what was given to her free of the charge. Counsel for the widow also contended, that failing this the gift of the interest was for six years, or during the lifetime of the son, and that she was entitled to say that she would take it for the six years. Or, in another way of looking at the matter, the gift of the interest was for six years, or until the son attained twenty-one, which in the events that here happened would, in effect, be the same as the latter of the former two contentions; but counsel nevertheless insisted upon the soundness of his argument in favour of the widow's right to receive the interest until the time at which the son, if living, would attain the age of twenty-one years.

Counsel for the defendants, James and Charles Bolton, contended, that it was erroneous to say that the gift of the interest was for the benefit of the widow, and that it was really the interest of the son's money which was given for his support, and further, that by reading the seventh clause of the will and looking upon the words occurring therein, "*so remaining as above, and to which he would then be entitled,*" as parenthetic, and merely descriptive of the money meant (which was the proper way to read this clause), the matter became plain, and that upon the death of the son (under age) the gift to James and Charles Bolton took effect immediately, and that the money should be paid to them.

A considerable number of authorities were referred to upon the argument. These I have perused, but, as in many cases for the construction of wills, it seems difficult to find authority that should really govern, and one is

left to ascertain as best he can what was meant by the testator by the words that he employed in making his will.

In the latter part of the fourth clause of this will there is a clear gift of the interest to be paid to the widow for the term of six years, or until the son should attain the age of twenty-one years. If this gift stood alone, the Court should take it, I think, in its largest sense, as was done in the case *Seale v. Seale*, 1 P. Wms. 290, and in *Cope v. Wilmot*, in the foot note to *Thompson v. Thompson*, 1 Collyer, at p. 296.

In the fifth clause the testator says, that the above mentioned gifts and bequests to his wife (and these include the interest) are in lieu of dower, and "on the further condition" that she will maintain, &c., the son till he should become of the age of twenty-one. This seems to me to affirm a second time that the gift of this interest is to the wife, and to attach this condition, as well as the one in regard to dower, to all that is given to the wife, and not alone to the gift of the interest. The right of the son to be suitably provided for would not be confined to this interest. He could have recourse to all that was given to his mother.

By the sixth clause of the will, the principal money was to be paid to the son upon his attaining the age of twenty-one. The only gift to him, so far as I can see, is contained in the direction of the trustees to pay to him, and in such cases where the payment is postponed or deferred for reasons personal to the legatee the common rule is, that the gift will not vest till the appointed time. There are, however, many circumstances which will have the effect of vesting a gift contingent upon attaining a given age.

In this case, I do not perceive that it will make any difference in the result of the contention between the parties, whether the gift to the son is considered a vested or a contingent gift, as I think the several clauses of the will must be read together, and that full effect must be given to the fourth clause in favour of the widow in respect to the interest, as well as to the seventh clause in favour of

the defendants James and Charles Bolton in respect to the principal moneys.

As to the contention that the widow is entitled to be paid the interest until such time as the son would, if living, have attained the age of twenty-one years; the words of the gift in this respect are: "For the term of six years or until my only son, William Stannord Bolton, shall become of the lawful age of twenty-one years."

According to this gift, the widow, upon the death of the testator, became entitled to the interest for the longer period, but this and the other gifts to her were subject to the conditions mentioned, and it is said that with regard to personal estate the civil law, which has in this respect been adopted by Courts of Equity, recognizes no distinction between conditions precedent and subsequent, 2 Jarman, 3rd. ed., p. 13. One of these conditions, after having been partly performed, became as to what remained of the performance, impossible by reason of the death of the son. It cannot be said that the sole motive of the bequest was the performance of this condition, for the bequest to which it attaches is all that was given to the widow, and not the interest alone, or that such an event was not in the mind of the testator, for it is an event that is mentioned in his will, and if it is contended that because the condition was one which in its creation was possible in its nature, but subsequently became impossible by the act of God, it (the condition) must be given effect to, the contention must go the length of saying that upon the death of the son the widow could be called upon to give up all that was given her by the will, for, as I have said, the condition attaches to all, one part as well as the other, and this could not have been the intention of the testator. It is quite plain that such was not his intention, as gathered from the contents of the will, and I am of the opinion that the true result of the consideration of the gift of the interest to the widow, and the condition in the events that have happened is, that the necessity for the further performance of the condition has been removed and that the gift stands. A statement of the Lord Chancellor in

Gough v. Bult, 16 Sim. at p. 54, and the case *Coates v. Needham*, 2 Vernon 65, cited by counsel for the widow seem to me to support this view.

As to the seventh clause of the will, I think the meaning is, that, in the event of the son dying before coming of age, the moneys which he would have been entitled to receive upon his attaining full age shall be paid over to the defendants James and Charles Bolton in the proportions stated, but that the time of payment to them is to be the same as the time of payment to the son would have been had he attained to or survived the age of twenty-one. I think the words of this clause are capable of being read in this way without doing violence to them or any of them, and I think the real meaning is, that in the event of the death of the son, as stated, the payment to them is substituted for the payment to him, as to the time of payment over as well as otherwise.

The foregoing disposes I think of the difference between the contending parties,

It was agreed amongst counsel that the costs of all parties should be out of the estate, which means the fund in question, and I think it is proper that the costs should be so allowed. The plaintiffs are, I apprehend, entitled to trustees' costs.

Judgment accordingly.

G. A. B.

[COMMON PLEAS DIVISION.]

LIVINGSTON V. TROUT.

Libel—Newspaper article commenting on previous trial—Correction of—Materiality—Malice—Pleading evidence in mitigation of damages.

The statement of claim in an action of libel brought by plaintiff, an insurance inspector and adjuster and at the time of action brought the liquidator of an insurance company, alleged that defendant in an article published in his newspaper commenting on the trial of a previous action of libel brought by plaintiff against defendant in which plaintiff had recovered one shilling damages, stated that he would not have been surprised if the jury had found more favourably for plaintiff, for though evidence of general reputation was admitted, the Court had refused to allow evidence of specific acts of improper conduct, unless directly connected with the insurance company; and that in further commenting on said trial in his said article falsely and maliciously published of the plaintiff, in his business as an insurance adjuster, that plaintiff would have been asked to explain the purchase of a claim in respect of a loss, one half of the amount of which he afterwards received from the company while their adjuster; and as to gifts received from persons whose losses he had adjusted; the innuendo alleged being that plaintiff had been dishonest in adjusting claims and had accepted bribes, &c.; and that the article was an unfair and false report of the trial. The defendant by his statement of defence admitted the publication of the article, but denied the innuendo, and also any malice &c.; and alleged that there was an inaccuracy in the article as to the question which might have been asked plaintiff by which a wrong impression might have been conveyed which was corrected at the earliest opportunity in defendant's newspaper by an article stating that the question referred to should have been that the purchase was made in respect of a loss which occurred while the company's adjuster, but that the payment was after he had left the company.

Held, on demurrer, that the difference between the first and second articles as to the payment on the alleged purchase was material, for if it was proved that the first article was in this respect false to the knowledge of the defendant, and he made no correction, this would be evidence of malice, and would probably materially affect the damages; but even if immaterial the plaintiff was not prejudiced: that it was only offered as a defence to a portion of the damages. The demurrer was therefore overruled.

STATEMENT OF CLAIM (a).

1. THE plaintiff is an insurance inspector and adjuster, and at present is the liquidator of the Standard Fire Insurance Company, and resides at the city of Hamilton; and the defendant is the proprietor, manager, and publisher

(a) In the demurrer book, the paragraph demurred to and that referred to, are only set out, but it is considered more satisfactory to set out the whole of the pleadings, which has therefore been done.

of a newspaper called the "Monetary Times," published at the city of Toronto.

2. On the 19th of December, 1883, the plaintiff had commenced an action against defendant for damages for libel published in defendant's newspaper, the "Monetary Times."

3. On the 3rd of May, 1884, the action was tried at the Hamilton Assizes, when a verdict was rendered in favour of the plaintiff against the defendant for the sum of one shilling.

4. In the issue of the defendant's said newspaper, bearing date the 30th of May, 1884, the defendant in reporting and commenting on the trial of the said action in an article headed: "Our First Libel Suit," falsely and maliciously printed and published of the plaintiff the following words, namely:

"Considering the scope of the evidence to which we were restricted, (meaning the evidence at the said trial) it would not have been a serious surprise to us had the jury decided more favourably to the plaintiff, (meaning the plaintiff herein) for although evidence of his (meaning the plaintiff's) general reputation was admitted, the Court refused to allow proof of specific acts of alleged improper conduct, unless the same were directly connected with the business of the Standard Fire Insurance Company. As to the general reputation of the plaintiff (meaning the plaintiff herein) evidence was given by a number of the most prominent insurance men in Canada."

Giving their names and their alleged evidence, which was stated to be that the plaintiff's reputation was bad, doubtful, and unfavourable.

5. The said defendant in his same issue of his newspaper, in further commenting upon the trial of the said action, falsely and maliciously printed and published of and concerning the plaintiff in his business as an insurance adjuster, the words following, namely:

"He" (meaning the plaintiff) "would have been asked for instance to explain the purchase of a claim in respect of a loss, one half of the amount being afterwards received by him (meaning the plaintiff) from the company while he (meaning the plaintiff) was adjuster of that company. And again, as to the receipt of certain gifts of money admitted on his

(meaning the plaintiff's) examination, from certain parties whose losses he (meaning the plaintiff) had adjusted ; and a number of similar matters."

6. The defendant meant thereby that the plaintiff had been dishonest in adjusting insurance claims, and had been guilty of accepting bribes from certain parties whose losses he had adjusted.

7. The plaintiff says that the said article containing the words hereinbefore set forth, is an unfair and false report of the evidence and proceedings at the said trial, and was written and published by the defendant maliciously and with intent to injure the plaintiff in the eyes of the public.

8. By reason of the premises, and of the printing and publication of the said libel, and the circulation thereof, the plaintiff has been greatly injured in his credit and reputation ; and has been otherwise damaged.

STATEMENT OF DEFENCE.

1. The defendant admits the statements contained in the first paragraph of the statement of claim.

2. The defendant admits that the words set forth in the fourth paragraph of the statement of claim, were printed and published by him as part of a newspaper article, but does not admit the meaning attributed to the words by the plaintiff.

3. Without the meaning attributed by the plaintiff to the said words set forth in said fourth paragraph of said statement of claim, the defendant says the said words in said fourth paragraph of said statement of claim in the sense in which they were used in the said newspaper article, are true in substance and in fact.

4. The defendant admits that the words set forth in the fifth paragraph of the statement of claim, were printed and published by him as part of the said article in said newspaper, the "Monetary Times;" and says that said words were contained in a public newspaper or other peri-

odical regularly published, that is to say, in said newspaper known as the "Monetary Times," and were inserted in such newspaper or periodical without actual malice and without gross negligence; and that at the earliest opportunity afterwards, to wit, in the issue of said newspaper of the 6th of June, 1884, he inserted in such newspaper or periodical publication, a paragraph in the words following:

"By one sentence in the paragraph in our article of last week, under the heading of "Our First Libel Suit," referring to the questions that might have been asked Mr. Livingston had he ventured into the box, a wrong impression may have been conveyed. The sentence should have run thus:

"He would have been asked for instance to explain the purchase of a claim in respect of a loss which occurred while he was adjuster for the company, for one-half the amount afterwards received by him from that company."

5. The defendant denies that he published of the plaintiff the said words, or any of them, with the meaning alleged in the sixth paragraph of the said statement of claim.

6. The defendant denies all the allegations contained in the seventh paragraph of the said statement of claim.

To the fourth paragraph the plaintiff demurred on the grounds:

1. The said fourth paragraph admits the cause of action set forth in the fifth paragraph of the statement of claim, and does not contain any answer thereto in law.

2. The said fourth paragraph instead of containing a plea of publication of a full apology for the said libel, contained in effect a portion of the same libel complained of in the said fifth paragraph of the plaintiff's statement of claim expressed in slightly different language, and is no answer in law to the cause of action set forth in the said fifth paragraph of the plaintiff's statement of claim.

On March 27, 1885, the demurrer was argued.

Clement, for the demurrer.

D. E. Thomson, contra.

March 28, 1885. ROSE, J.—This is an action of libel. The plaintiff complains of an article appearing in the "Monetary Times," published by the defendant.

The defendant admits publishing the article, denies that the words are capable of the meaning attributed to them by the plaintiff, claims that they were published without actual malice or gross negligence, admits that an inaccuracy of statement appeared in the article, and states that at the earliest opportunity such error was corrected by an article inserted in the same paper. The paragraph in which such admission of error or mistake is set out is No. 4.

It will be observed that the opening words of that paragraph would lead the reader to suppose that an apology was to be pleaded; but it is apparent, and was admitted, that the clause merely sets out upon the record facts offered in mitigation of damages.

To this clause the plaintiff demurs, assigning as a ground of demurrer, that the paragraph does not contain a full apology, but merely repeats the libel in slightly different language.

By reference to paragraph five of the statement of claim, it will appear that the error or mistake was in alleging that the purchase of the claim and receipt of the amount were while the plaintiff was adjuster of the company, while as a matter of fact, as the defendant alleges, the purchase was of a loss which occurred while he was adjuster, and the payment was received after he left the company.

By the article, as it first appeared, the loss, purchase, and payment were alleged to have been while he was adjuster. By the second article the loss is alleged to have occurred while he was adjuster, the payment after he left the company, and the time of the purchase is left doubtful. If it should be thought that the meaning of the article was that the purchase was after he left the company, it might have a material effect upon the result.

If the plaintiff at the trial were in a position to shew that the first article was false, to the knowledge of the

defendant, and that the defendant made no correction, such fact would be evidence of malice, and probably would materially affect the damages. See *Odgers* on Libel and Slander, 1st Am. ed., p. 302.

As I read *Scott v. Sampson*, 12 Q. B. D. 491, facts which the defendant intends to rely upon in mitigation of damage should be spread upon the record.

It is true the evidence there rejected was as to the conduct of the plaintiff; and it is manifestly unfair that a plaintiff should be called upon, without notice of the particular facts relied upon, to defend his whole life. But upon reference to the judgment of Cave, J., at p. 498, it will appear that "the rule was moved and obtained on the ground that the evidence was admissible in mitigation of damages"; and, at p. 507, that "the defendant proposed to prove certain facts which he alleged were material; but these facts were not stated or referred to in the pleadings"; and on that ground "their rejection might have been supported.

I am, at present, of the opinion that such facts as appear in the paragraph demurred to are material: that even if they had not been stated or referred to in the pleadings, I should not, were I presiding at the trial of the cause, feel justified in refusing to allow them to be given in evidence: that under *Scott v. Sampson* they are properly placed upon the statement of defence: that, even if they turn out to be not material, they cannot in any way prejudice the plaintiff: that they are not and could not be considered to be offered as a defence, except as to a portion of the damages claimed; and that there was no necessity for demurring.

The test seems to be: are the facts set out upon the record in the statement of defence notice of evidence which would be receivable in mitigation of damages? If so, they are properly there under O. J. A., Rule 128; and the fact of the notice not being thus given would justify the exclusion of the evidence at the trial.

The demurrer must be overruled. As a motion was made for an order to strike out the clause demurred to, on the ground that the demurrer was not set down to be

argued, and as the defendant was let in to argue the demurrer on terms, I think the fair order will be without costs : *Livingston v. Trout*, 10 P. R. 493.

I desire to direct attention to the form of the demurrer book, setting out only the paragraph demurred to, and the paragraph referred to in the statement of claim. I recognize the attempt to keep down the costs, but it will be apparent that it would, in this case, have been much more convenient had the whole pleadings been set out. I was obliged to procure a copy of the statement of defence before I could consider the demurrer, and this necessarily so as I was bound to consider the pleading as a whole although divided into paragraphs.

Judgment for defendant.(a)

(a) See *Wilson v. Wood*, judgment of ROSE, J., not yet reported.

[CHANCERY DIVISION.]

CANADIAN LAND AND EMIGRATION COMPANY V. THE
MUNICIPALITY OF DYSART ET AL.

*Injunction—Assessment—Court of Revision—Fraud—Jurisdiction—Costs—
Demurrer ore tenus—Stay of proceedings pending an appeal—37 Vic.
ch. 65, O.*

Where plaintiffs alleged in their statement of claim that they had appealed in respect of the assessment of their property to a certain Court of Revision; and that the members of the Court, by a fraudulent conspiracy among themselves, and from interested motives, in face of facts leading obviously to a contrary conclusion, and without any evidence to support the same, had not only dismissed the appeal, but on a cross-appeal brought in respect of the said assessment as too low, had greatly increased the amount thereof.

Held, by FERGUSON, J., on demurrer *ore tenus*, that inasmuch as an appeal lay from the Court of Revision to the stipendiary magistrate the plaintiffs should have appealed accordingly, and could not come to this Court for an injunction, at least until they had exhausted their other remedies. The above judgment having been given, the plaintiffs applied for a stay of proceedings pending a rehearing on appeal.

Held, by FERGUSON, J., that there was jurisdiction to make the order notwithstanding that the action was dismissed, and the order might go upon terms.

At any time before formal judgment issued by the Court, the judgment or part of it may be recalled, and a term imposed or a change made.

On an appeal from the judgment of Ferguson, J., to the Divisional Court, the Court was divided except as to the costs, and the judgment appealed from was therefore sustained.

Per BOYD, C.—The claim of the plaintiffs to the interference of this Court is not one of absolute right, but one resting on judicial discretion, and that discretion was rightly exercised in dismissing the action. The stipendiary magistrate has power to deal with the matters in question in the most ample manner. The Statute intends that the value of lands shall be fixed by the municipal authorities, and not until all statutory means have been exhausted should recourse be had to this Court for relief. As to costs the defendants are to blame for not having placed a demurrer on the record, and so had the preliminary question of law decided before the trial. The costs of the motion for injunction should be given to the defendants, and further costs should be given thereafter as if the defendants had successfully demurred; and the costs of this appeal should be given to the defendants.

Per PROUDFOOT, J.—The special Act for the Territorial Division of Haliburton, R. S. O. ch. 6, sec. 23, gives an appeal to the stipendiary magistrate against any *decision* of the Court of Revision. The action of the Court was a mere travesty of a judicial proceeding. The function of the Court was judicial to hear and determine. The action of the Court in deciding in opposition to the only evidence given before them appears to establish that the whole was a fraudulent arrangement by the members of the Court of Revision. To give the stipendiary magistrate jurisdiction the Court of Revision must have given a *decision*. The admission by demurring that the action of the Court was fraudulent in effect determines that there was no *decision*. It was not intended by the Legislature that it should be the duty of the stipendiary magistrate

to enquire into fraudulent proceedings of the Court of Revision, but to consider whether an honest decision was to be revised. If this Court has jurisdiction, as it certainly has, where the acts complained of are vitiated by fraud it cannot refuse to entertain the suit because the plaintiffs may have another and perhaps a more convenient remedy. He agreed with the Chancellor as regards the costs.

THIS was an action brought by the Canadian Land and Emigration Company (Limited) against the municipality of Dysart, and James Dover, Robert McKelvie, Sanford McEvens, Thomas Moon, and Joshua Paul, who were the persons composing the Court of Revision of the said municipality, for an injunction restraining the individual defendants from increasing the company's assessment on certain real estate.

The statement of claim set up that the plaintiffs were a duly incorporated company, owning about 355,144 acres of real estate, chiefly wild lands, in the various townships comprising the municipality of Dysart: that in the year 1883 they were assessed for the same at \$111,095, which figure was fixed by the stipendiary magistrate for the county on an appeal to him from the Court of Revision: that previously, in 1882 and 1883, they offered all their real estate for sale, but received no larger offer than \$80,000: that afterwards half the shares of the company were sold to two of the commissioners of the company in Canada at a valuation of \$80,000 of all the company's property, nevertheless, in the face of these facts, the stipendiary magistrate had in 1883 assessed their property at \$111,095, as above mentioned: that in 1884, though the value of the property had not increased but decreased, some sales having taken place, the company's real estate was assessed at \$157,488, an increase of \$46,393: that this increase of assessment was a great wrong, and the plaintiffs appealed to the Court of Revision of the municipality of Dysart, and with an impartial tribunal and on proper consideration the assessment would have been reduced to \$80,000: that the individual defendants comprised the said Court of Revision: that one Frederick Dover, a brother of the defendant James Dover, who was Reeve of

township of Dysart, in the said municipality, at the same time appealed to the Court of Revision against the plaintiffs' assessment, on the ground that it was too low but not specifying any particular lands as undervalued: that some settlers of the said township also appealed to the Court of Revision against their assessments as too high: that on May 31st, 1884, the Court held a sitting, the individual defendants being present and forming the Court: that though evidence was given by the plaintiffs of the value of the company's property being as above stated, no other evidence was called for by the Court, nor was the assessor, though in Court, asked any questions, nor was any other evidence given of the value of the property, yet the Court of Revision, without taking any time to consider the matter, confirmed the assessments of the other persons appealing and increased the company's assessment by \$85,625.75: that the increase was not made on any particular lots in each township, nor was it possible for the company to ascertain by the action of the Court of Revision to what lots the increase had reference: the company's lands were thus assessed at \$243,113.75 in 1884, as against \$111,095 in 1883: that they, the plaintiffs, had since ascertained, as the fact was, that the defendant James Dover, Reeve as aforesaid, had previously to the sitting of the said Court and the hearing of the said evidence, settled on behalf of himself and the other members of the Court the amount by which they would increase the company's assessments in the several townships: that they had also since ascertained that the individual defendants procured their election as councillors for the municipality partly through signifying to the electors that if elected the company's assessment would be increased: that they had also since ascertained that several of the members of the said Court held a secret meeting previously to the sitting and arranged that the municipality should be canvassed, and that the settlers should be induced to appeal from their own assessments as aforesaid as too high, compared with the company's assessment, in order to give some ground

for raising the company's assessment: that accordingly the said councillors arranged the said appeals by settlers: that the appeal by Frederick Dover was also arranged at the said meeting: that the defendants, being owners of property in the municipality, were personally interested in assessing the company as highly as possible: that James Dover had always been greatly opposed to and had expressed hostility to the company, and had always exercised great influence over the other members of the council, and he used this influence to procure the above increase in the company's assessment: that from the whole action of the Court of Revision in this matter, and from the individual action of the members thereof previously to the sitting of the Court, it appeared that the members of the Court had agreed among themselves previously to the holding of the Court to increase the company's assessment in the manner aforesaid, and what took place at the said secret meeting held previously to the sitting of the Court, and the procuring appeals of the settlers as aforesaid, and the appeal of Frederick Dover, as arranged at the said meeting, and the action of the Court of Revision when the question of the company's assessment came up before them, were all parts of a fraudulent and improper arrangement and conspiracy that had been entered into before the holding of the Court of Revision by the members of the Court among themselves in conjunction with others, to increase the assessment of the company: and the plaintiffs claimed an injunction restraining the individual defendants from increasing the assessment of the company above a sum of \$80,000, and for further relief, and costs from the municipality.

The defendants delivered a joint statement of defence, disputing the allegations in the statement of claim and denying all improper conduct.

The rest of the facts of the case sufficiently appear from the judgments.

On June 24th, 1884, the plaintiffs moved before Proudfoot, J., for an interim injunction to restrain any action being taken in the assessment until the trial of the action.

W. Cassels, Q.C., and G. T. Blackstock, for the motion, referred to *High on Injunctions*, 3rd ed., s. 493; *Merrill v. Humphrey*, 24 Mich. 170; *Lefferts v. Board of Supervisors of Calumet County*, 21 Wis. 697; *The Milwaukee Iron Co. v. The Town of Hubbard*, 29 Wis. 51; *Nickle v. Douglas*, 37 U. C. R. 51; R. S. O. c. 180, secs. 23, 192; *Squire v. Wilson*, 15 C. P. 284.

Hudspeth, Q.C., contra.

June 25th, 1884. PROUDFOOT, J.—I have read all the evidence, and I think enough is shown to render it expedient that no action should be taken upon the assessment as revised by the Court of Revision until the hearing of the cause.

An arrangement among the tax payers to get up appeals from their own assessments for the purpose of lowering them, and to appeal from the assessment of the plaintiffs for the purpose of increasing it does not seem to me to be illegal: the object is legitimate enough if the assessments were in fact too high or too low.

But it is entirely a different question if the scheme be proposed or fostered by the Court of Revision or the members of it. The members of the Court are sworn to the best of their judgment and ability and without fear, favour, or partiality, honestly to decide the appeals to be brought before them. It appears from the evidence that prior to the sitting of the Court a meeting was held at Mr. Niven's office, at which three of the five members of the Court seem to have been present, and an arrangement come to by which persons were appointed to canvass for appeals. The members of the Court do not seem to have themselves canvassed, but there is no doubt it was done with the approval of those present.

The plaintiffs had by this time appealed from the assessment of their property, which had been fixed by the assessor at about \$157,000, an increase from \$111,000 in 1883. Some seventy appeals were filed claiming a reduction of assessments, and one was filed against the assessment of the company as too low. The plaintiffs gave evidence to show that they were assessed too high: that their lands were wild, several of the townships having no settlers, no roads giving access to them, and that, since they purchased from the Government, free grant townships had been opened adjoining their lands, which greatly reduced the value of their lands, rendering them to a great extent practically unsaleable, and that the only offer they had been able to get for the whole property was \$80,000.

In opposition to this there seems to have been only a general statement by or on behalf of the appellants, that their wild lands were not worth more than the wild lands of the plaintiffs. No evidence was given of the actual value of the plaintiffs' lands; and another reason that operated upon some of the members of the Court was an alleged agreement made by the plaintiffs ten years before, that for the purpose of raising a bonus for a railway their lands should be assessed at a higher rate. There was no discussion in the Court. A paper prepared by James Dover, the Reeve, was handed round specifying increased rates for the plaintiffs' lands in the different townships, which was at once accepted and embodied in a resolution by the Court. The Court rejected the appeal for a reduction and increased the assessment of the company to \$243,321.

Without determining as a fact that there was improper conduct on the part of the members of the Court of Revision, there is a sufficient *prima facie* case made out to render it proper that the case should be investigated. The preliminary meeting, the canvassing for appeals, the decision without evidence of the value, are calculated to invite enquiry; and I think that before increasing the assessment it was incumbent on the Court to have evidence before it, not of that general character which has been

pointed out, but evidence to show that the plaintiffs' lands were of the value of the settlers, that lands in remote townships, without roads, without improvements, of various qualities of soil, were of equal value with lands adjoining settlements; that wood lands in a wholly unsettled township were as valuable as the wooded portions of a partially cleared farm. There seems to have been no such evidence. The assessor was in Court but he was not examined. Several, if not all, of the members of the Court were influenced by the alleged agreement at the time of granting the bonus to the railway. There seems to have been some talk about this by the agents of the company, but no agreement binding on the company was made, and the next year (nine years ago) it was repudiated by them, and their assessment upon that basis reduced, and no attempt was made till the present year to enforce it. In acting upon that the Court were in effect compelling specific performance of an agreement, the existence or validity of which was denied. That was not a proper basis on which to proceed. They had no jurisdiction to determine the validity of the agreement, and the assessment was raised not to an actual but to a fictitious value.

But it is said that if dissatisfied with the decision of the Court of Revision the plaintiffs could appeal to the Stipendiary Magistrate: 37 Vic. c. 65, s. 32 (O.), R. S. O. c. 180, s. 56, 59, and 65; and that they can get no relief in this Court.

There is no doubt that as a general rule, the Stipendiary Magistrate is the proper appellate tribunal. A number of objections have been made to the person of this officer as rendering him not an impartial or proper judge. Of these I shall say nothing, because it is a question of fair argument whether the rule applies to a decision obtained by what is alleged to be a corrupt combination to impose a burden on the plaintiffs they ought not to bear. The existence of that combination is as I have said, a proper subject for enquiry.

The cases referred to appear to decide that if the decision of the Court be a corrupt or fraudulent one, there is no obligation to appeal from it, but recourse may be had at once to this Court to restrain proceeding upon it.

I do not determine any of these matters further than to say they are proper subjects for investigation at the hearing.

The granting of the injunction will inflict no injury on the defendants, as the case can be heard before there will be any necessity for acting upon the assessment.

The action came on for trial at Toronto, on December 13th, 1884, before Ferguson, J., and the following argument took place on that day, and on December 16th, 1884 :

D. McCarthy, Q. C., and Hudspeth, Q. C., for the defendants. We take the objection that we are not properly brought here. The only remedy for the plaintiffs is by prohibition or *certiorari*. This Court cannot decide that the judgment of another Court should be vacated. The plaintiffs might perhaps have applied for a prohibition before judgment, or appealed after judgment; or if there was no appeal, then their only remedy was by *certiorari*: *The Mayor of New York v. Davenport*, 92 N. Y. 604; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Dimes v. The Grand Junction Canal*, 3 H. L. Cas. 759; *Barter v. Palmer*, 8 Q. B. D. 9; *Ex parte Wake*, 11 Q. B. D. 291, 12 Q. B. D. 142; *Regina v. Local Government Board*, 9 Q. B. D. 600, 10 Q. B. D. 309; *Comyn's Dig.* vol. 7, Prohibition D; *Stannard v. The Vestry of St. Giles*, L. R. 20 Ch. 190; *Essery v. Court Pride of the Dominion*, 2 O. R. 596; Assessment Act, R. S. O. ch. 180, secs. 48, 49, 56, 57, 59.

S. H. Blake, Q. C., W. Cassels, Q. C., and G. T. Blackstock, for the plaintiffs. One is not driven to go out of the ordinary course: *Ledyard v. McLean*, 10 Gr. 151. The act of the defendants was nugatory because of fraud: *Udell v. Atherton*, 7 H. & N. 172; *Weir v. Matheson*, 11 Gr. 383; *Nickle v. Douglas*, 37 U. C. R. 51; *High on Injunctions*, 2nd ed.

p. 325, sec. 493; *Beddow v. Beddow*, 9 Ch. D. 89; *Malmesbury R. W. Co. v. Budd*, 2 Ch. D. 113; *Regina v. Justices of Great Yarmouth*, 8 Q. B. D. 525; *Hedley v. Bates*, 13 Ch. D. 498. There should be nothing read into the Assessment Act to make the members of the Court of Revision Judges; the Act does not call them Judges. We refer also to *Calder v. Halkett*, 3 Moo. P. C. 28; *Lewis v. Gray*, 1 C. P. D. 452; *Merrill v. Humphrey*, 24 Mich. 170; *Lefferts v. Board of Supervisors of Calumet County*, 21 Wis. 697; *The Chicago, &c., R. W. Co. v. Cole*, 75 Ill. 591; *Bandon v. Becher*, 3 Cl. & F. 479; *Wells on Res Adjudicata*, secs. 488, 489; *The Milwaukee Iron Co. v. Town of Hubbard*, 29 Wis. 51. We submit that there is full power in the Court, and the question is one of fact.

D. McCarthy, Q. C., in reply. There are only three ways in which a judgment can be vacated, appeal, prohibition, and *certiorari*: *High on Extraordinary Remedies*, sec. 763. In this case there was jurisdiction, therefore, there can be no prohibition. Besides the judgment of the Court of Revision was given and complete before the application here, and moreover the party plaintiff is not before the Court: *Yates v. Palmer*, 6 D. & L. 283; *In re Denton v. Marshall*, 1 H. & C. 654; *Buggin v. Bennett*, 4 Bur. 2035; *Full v. Hutchins*, Cowp. 422; *Ex parte Wake*, 11 Q. B. D. 291. *Certiorari* would bring up the judgment, and if there is fraud the judgment will be quashed, but only at discretion. This, however, will not be done where there is an appeal: *Queen v. Lee*, 9 Q. B. D. 394; *Dimes v. The Grand Junction Canal*, 3 H. L. C. 759. The case of *Lefferts v. The Board of Supervisors of Calumet County*, 21 Wis. 697, is no authority whatever here, because the plaintiffs there did all they could before going before the Court of Chancery. *Merrill v. Humphrey*, 24 Mich. 170, was a widely different case to this. *Beddow v. Beddow*, 9 Ch. D. 89, is also different, for these defendants are bound to sit on the Court of Revision, and are not like arbitrators. *Hedley v. Bates*, 13 Ch. D. 498, and *Stannard v. Vestry of St. Giles*, L. R. 20 Ch. 190, are the nearest cases to the

point in question. *Nickle v. Douglas*, 37 U. C. R. 51, is a case of no jurisdiction, and is not like the present case.

December 17th, 1884. FERGUSON, J.—Since the argument of the questions raised I have had an opportunity of seeing Mr. Justice Proudfoot, who granted the interim injunction, and he informs me that he did not intend to determine any of the matters before him further than to say that they were proper subjects for investigation at the trial, and that he did not intend that what he said should be binding upon the Judge before whom the cause should be tried.

After referring to his notes of the argument held before him he also said that in the case made before him it was stated that the stipendiary magistrate had been a party to the alleged fraudulent combination, reference being made to certain passages in the depositions to show that such was the fact, and that he was influenced by this consideration.

In this view of the matter the case made for the interim injunction differed from the case stated on the face of the pleadings now. The interim injunction appears to have been granted in June, and the plaintiffs' statement of claim appears not to have been delivered until the month of October following.

There seems to be no doubt that the Court of Revision had jurisdiction when they acted in the matter complained of. This is not denied or questioned. What is alleged is, that their conduct was fraudulent, and to the disadvantage of the plaintiffs.

Their act was not unauthorized and void, as and for the reasons that existed in the case of *Nickle v. Douglas*, 37 U. C. R. 51, or in other cases where there was the want of jurisdiction.

From the decision of the Court of Revision an appeal lay to the stipendiary magistrate as an appeal lies here to the Judge of the County Court. This was not denied, but on the contrary was admitted on the argument.

If the plaintiffs had appealed from the decision complained of, they could have had the assessment of their property settled, and presumably properly settled, by the magistrate acting in the capacity in which the County Judge acts in such cases here. The decision of the Court of Revision as it appears is final, unless appealed against. The Act R. S. O. ch. 180, sec. 57 says that "the roll as finally passed by the Court, and certified by the Clerk as passed, shall, except in so far as the same may be further amended on appeal * * be valid, and bind all parties concerned, notwithstanding, &c."; and in case of appeal, the decision of the Judge or acting Judge is by the Act, sec. 65, declared to be final and conclusive in every case adjudicated.

The plaintiffs did not appeal to the Judge, the stipendiary magistrate, but brought this suit for an injunction, alleging fraud on the part of the members of the Court of Revision, and a fraudulent combination or conspiracy against their interests.

The substance of what the plaintiff wanted was, that the property should be properly assessed so that they should have no more to pay than their fair and proper proportion of the taxes, and this I must assume, as I have said, they could have had by an appeal to the stipendiary magistrate, who is the Judge pointed out by the statute before whom the appeal would be heard and determined, as the Court of Revision is by the statute constituted for the performance of its part of the duties.

In the case of *Stannard v. The Vestry of St. Giles*, 20 Ch. D. at p. 196, the then Master of the Rolls says: "Where the Legislature has pointed out a mode of proceeding before a magistrate, it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction," and the learned Judge there explains the decision in *Hedley v. Bates*, 13 Ch. D. 498, which he seems to have thought was in some respects misunderstood. The exception is stated to be where there is ground for the Court interfering independently, having a question to try within its

undoubted jurisdiction over and above the question which the magistrate could decide. In *High on Injunctions*, sec. 493, it is said: "Where, therefore, a particular manner is provided by law, or a particular tribunal designated, for the settlement and decision of all errors or inequalities on behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax." This statement is however preceded in the same section by a statement that "the fundamental principle applicable to such cases is that a Court of Equity is not a Court of Errors to review the acts of public officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion if they have acted honestly."

In the case of *Merrill v. Humphrey*, 24 Mich. 170, an injunction was granted where a supervisor of a township had fraudulently and with a view to impose upon an individual more than his just proportion of the public burden of taxation, assessed the property of such individual above its value. The learned Judge, after stating the case in the course of his judgment, asked the question: "Has this citizen any remedy against the threatened wrong?"

The case of *Lefferts v. Board of Supervisors of Calumet County*, 21 Wis. 697, is a somewhat similar case, and the Court in giving judgment said at p. 700: "We have found no direct authority in support of the proposition that fraud on the part of officers in assessing and levying taxes is a good ground for the interference of a Court of Equity; but such interference appears to us to be in accordance with sound reason and justice."

In this case reference is made to a remedy by applying to the Board of Equalisation, and the constitution of the Board is somewhat discussed, from which it would not appear that it is an appellate tribunal at all, such as the County Court Judge is here, and the conclusion is stated by the Court, that no other mode of relief was, for the reasons given, open to the plaintiff but to apply to the Court to restrain the collection of the void tax.

There are, perhaps, other American cases in which the Court has so interfered.

The ones I have referred to seem to me to proceed upon the ground that the plaintiff had no other remedy against the wrong, and I apprehend the parts of the statement in the American text book, to which I have referred, where the author uses the words, "if they have acted honestly," is predicated upon the same idea, that there is no other remedy for the plaintiff, and, in this respect, it seems that there is a difference between the laws on which the Courts acted in these American cases and our laws upon the same subject, so that even if the cases were authorities in this country I think they would not be in point, and I should not be bound by them.

I have perused all the authorities mentioned during the argument (necessarily with some haste) but I have not the time at my command to refer to them here. I think the principle stated by the Master of the Rolls in *Stunnard v. Vestry of St. Giles*, 20 Ch. D. 196, applicable, and the conclusion at which I have arrived is, that the Legislature having created the tribunals, and prescribed the machinery for making and adjusting assessments, a person assessed finding fault with the decision of such tribunals, or the working of such machinery, is not at liberty, even upon alleging and being able to prove fraud, to depart from them, and come to this Court for an injunction, at least till he has exhausted his remedies there.

I think the plaintiffs should have appealed from the determination of the Court of Revision, and that they cannot maintain the action here even upon their own showing.

I was at first much impressed with the arguments based on the ground of fraud, and the statement of the law that it avoids even the most solemn decisions of Courts of Justice; and I have had great anxiety in respect to the question as to whether or not one who feels himself aggrieved, and is, as it were, driven to an appeal, has the right to be placed in such a position as will enable him to

go to the appellate tribunal in assessment cases with an honest judgment in his hand, however erroneous the judgment may be.

My conclusion is, as I have stated, that the Legislature having provided certain remedies for him, these he must adopt, at least until he has exhausted them, before coming to this Court for an injunction.

Upon any matter akin to public policy one should speak sparingly, yet I may be permitted to say that I do not see the reasonable possibility of adjusting assessment rolls, if any one whose property is assessed and who suspects want of good faith in making or adjusting the assessment, is at liberty, at any stage of the proceeding carried on in the manner provided by the Act, to come to the Court upon an application for an injunction, and have a question of alleged fraud tried and determined. The action is dismissed.

At the close of the delivery of the judgment in the action Mr. Blake, of counsel for the plaintiffs, claimed that there should only be costs of a demurrer allowed, and authorities were cited for and against this contention, which are referred to in the following judgment, delivered on the point by his Lordship, after reserving it for consideration :

January 21st, 1885. FERGUSON, J.—The defendant put in a statement of defence, and the action was brought down to trial, a large number of witnesses having, as I understand, been subpoenaed. The defendant, before any evidence was given demurred *ore tenus*, and after argument the action was dismissed. The question as to the costs remains to be determined. If the present judgment is right it is beyond doubt that the defendants might have demurred without raising any issue of fact, and succeeded upon such demurrer.

The plaintiffs I assume contend that the defendant should be allowed no more costs than if they had so demurred to

the statement of claim and succeeded upon the demurrer, and they refer to the cases *Brouse v. Cram*, 14 Gr. 677; *Attorney-General v. Campbell*, 19 Gr. 299, and *Saunders v. Stull*, 18 Gr. 590. The first two are authorities directly in favour of the contention, and the last mentioned one decides that charges of fraud do not justify answering a demurrable bill; the defendants having answered when they might have demurred with success, the bill was dismissed, without costs. The latest of these cases was decided in 1872.

The defendant relied upon *Bush v. Trowbridge Waterworks Co.*, L. R. 10 Ch. 459, where an apparently contrary doctrine is strongly asserted, and the case *Pearce v. Watts* L. R. 20 Eq. 492, in which the late Sir George Jessel followed *Bush v. Trowbridge Waterworks Co.*, adding some reasons of his own. Both these cases were decided in the year 1875.

In the case *Gilderslieve v. Cowan*, 25 Gr. 460, the late Chief Justice refers to *Bush v. Trowbridge Waterworks Co.*, and quotes some of the reasoning of the Lords Justices, and he concludes by saying that it is an authority that it is not in every case where a bill may be demurrable, and a party answers, and the bill is dismissed at the hearing, it must be dismissed, without costs; but, that, on the other hand it is not an authority that in a simple case where the bill is clearly demurrable, and a defendant answers, and the bill is dismissed at the hearing, it will not be dismissed, without costs. The learned Chief Justice, then the Chancellor, considered the case before him a simple one, and he did as was done in *Saunders v. Stull*, dismissing the bill as against the defendant Ann Cowan, without costs. In the course of the judgment he says the Court has steadily acted upon the principle that where there are two courses open to a party, the one more and the other less expensive, and the party can with equal advantage to himself take the less expensive course, and he takes the more expensive one, he does so at the peril of costs; *Pearce v. Watts*, L. R. 20 Eq. 492, is not referred to in that case at all.

It does not appear to me that these authorities are easily reconcilable: what the learned Chief Justice would have done in *Gildersleeve v. Cowan*, if he had not considered the case a simple one, he does not say, but he leaves room for thinking that had he looked upon it as a case not of simplicity, but as one presenting difficulties and questions of law not of frequent occurrence, as the one before me in my opinion does, he would not have decided the question of costs as he did, having, as he had, before him the case *Bush v. Trowbridge Water Works Co.*, and the reasons contained in it given by an appellate Court.

The case before me is one of a peculiar character. It presented, I think, what might fairly be called difficulties. It is not, at all events, a case of a simple kind; the question of law involved in the case upon the demurrer was one that does not often arise before the Courts. The case is one of much importance, involving the liability, or not, for a large sum of money. On account of the importance of the case and some other considerations, an order has lately been made staying the operation of the judgment until the opinion of the Divisional Court can be obtained, and, after some anxiety on account of the state of the authorities in our own and the English Courts, I have arrived at the conclusion that the dismissal of the action should be with costs. The defendants will therefore be entitled to be paid their costs by the plaintiffs.

On January 8th, 1885, the plaintiffs moved for a stay of proceedings until the case could be heard before the Divisional Court.

S. H. Blake, Q. C., for the motion.

B. B. Osler, Q. C., contra.

The following authorities were referred to: *The Corporation of the Town of Welland v. Brown*, 4 O. R. 217; *Roskell v. Whitworth*, 19 W. R. 804; *Walker v. Niles*, 3 Ch.

Ch. 418; *Polini v. Gray*, 12 Ch. D. 438; *Cotton v. Corby*, 7 Gr. 50; *Campbell v. Edwards*, 6 P. R. 159; *Holcomb v. Shaw*, 22 U. C. R. 92; *Langford v. Kirkpatrick*, 2 A. R. 513; *Charlesworth v. Ward*, 31 U. C. R. 94; *Parrs v. Fewkes*, L. R. 1 Eq. 392; *Mayor of Gloucester v. Wood*, 3 Ha. 131.

January 9th, 1885. FERGUSON, J.—Judgment on motion for stay, which appears to be like a motion to continue the injunction, which was granted, or for an interim injunction, or it may be considered nothing more than to stay the operation of the judgment, or imposing a term additional to it, and for an order to expedite the rehearing of the cause.

After having examined the authorities referred to by counsel on each side I am of the opinion that there is jurisdiction, notwithstanding that the action was dismissed. In the case *Cotton v. Corby*, 7 Gr. 50, a bill for the purpose of restraining proceedings at law for the enforcing of a judgment having been dismissed, the Court continued the interim injunction which had been obtained during the progress of the cause, until the decision of the Court of Appeal could be obtained, upon the amount of the judgment being paid into Court or security being given.

In a case *Glasgow v. Glasgow (a)* in this Division of the

(a) This was an action which came up for trial at London, on November 29th, 1883, before Ferguson, J. At the commencement of the proceedings, counsel for the plaintiff moved for judgment against W. J. Glasgow, one of the defendants, who was not represented at the trial, but who, counsel alleged, had been served with process by publication. His Lordship, however, refused the motion on the ground that it was not shewn that a notice of the motion was given to the said defendant by posting it up in proper time, or otherwise howsoever. The trial, at the request of all the counsel present, then proceeded, and after the taking of evidence, consent minutes of judgment as between the other parties were finally put in and approved by his Lordship. On January 9th, 1884, and on the application of the plaintiff, affidavits being produced shewing a proper posting up of the notice of motion for judgment against the said defendant, his Lordship decided as follows :

FERGUSON, J.—The judgment has not yet been drawn up or issued, and I am asked to open up the matter of the refusal of the judgment against the absent defendant, W. J. Glasgow. Had the material now produced

Court only a short time ago, after consultation with the Chancellor and Mr. Justice Proudfoot, I recalled a judgment upon a motion for judgment against one of the defendants, upon further evidence being adduced, and changed the conclusion.

We were all then of the opinion that, at any time before formal judgment issued by the Court, the judgment, or part of it, might be recalled and a term imposed, or a change made. It is, of course, not a desirable thing to do, but circumstances may well justify its being done.

The judgment in this action has not yet been issued, and, as to the costs of the action, it has not been pronounced. At the time of the reading of the judgment on the motion which was similar to a demurrer *ore tenus*, plaintiffs' counsel moved for a stay until a rehearing or appeal could take place. This was opposed, and counsel for the defendants said that a time sufficient would elapse before anything could be done actively to the injury of the plaintiffs, even if my judgment were reversed.

The evidence on this motion shows, I think, that this was an error, and there appears now a necessity for interference, if the plaintiffs are to have the opinion of the full Court, before paying over a large sum of money, which, in the event of a reversal of the judgment, they might have difficulty in recovering back.

The case is one of peculiarity, or, at all events, of a kind not of frequent occurrence, and the desire of the plaintiffs to obtain the opinion of more than one Judge before submitting to payment of so large a demand cannot, I think, be considered unreasonable. They have offered to pay the whole amount, or part of it to the defendants, and the balance into Court pending the desired rehearing of the

been before me at the trial, there would have been judgment against the absent defendant. After consultation with the Chancellor and Mr. Justice Proudfoot, I open up this matter, and there is judgment against the absent defendant, W. J. Glasgow, according to the consent minutes of judgment between the other parties which is, under the circumstances, I think, a proper judgment to be pronounced against him, the defendant W. J. Glasgow, on this motion for judgment.

cause, without prejudice to any of their contentions. But they and the defendants have failed to agree as to the proportion of the same that should be so paid to the defendants. Counsel for the defence contended that the balance of convenience is in favour of not granting the order that is asked by the motion and pointed out certain dangers or troubles that might arise in respect of the collection of the taxes, &c., in the event of the success of this motion, but, with the order that I am about to make, I do not see the probability of these or any of them arising.

I am told by counsel that there is a recent decision of the Court of Appeal which is an authority for making the order to expedite the rehearing by placing the cause at the head of the list of causes to be re-heard at the next sittings of the Court. I have not seen that case, but, assuming that such authority exists, I am of the opinion that an order should be made as follows: staying the operation of the judgment so far as it had the effect of dissolving the interim injunction until such time as a decision upon the rehearing of the cause can be had, so that the defendants may be in the meantime restrained from proceeding against the plaintiffs for the collection of the taxes, upon the plaintiffs paying without prejudice to any of their contentions into Court to the credit of this cause to abide the further order of the Court the whole amount of the demand, which is said to be \$7,500 or thereabouts, and directing that the cause be placed first in order upon the list of cases to be reheard at the next sittings of the Court, with leave to the defendants to move to rescind this order in case the plaintiffs do not proceed diligently to a rehearing of the cause, and to apply for payment out to them of such part of the money as they may be advised. I have not a copy of the injunction, and do not know in what form it was. It should continue only so as to restrain proceedings against the plaintiffs. Upon any application for payment out of money particulars can be set forth in the evidence, and what shall appear proper done. — There will probably then

be a better opportunity of seeing what, in respect of the amount to be paid out, is correct than now.

The money should be paid into Court within days, or the motion refused. It may be that some inconvenience will arise to the defendants, but if so I do not see how that can be avoided. A party who desires the opinion of more than one Judge upon a matter of importance involving questions of law of rare occurrence, and who is willing to pay the whole amount of a large demand into Court to the credit of the cause in the meantime, and when the period is so short before the sittings of the Court, presents a strong case for consideration. I feel that I cannot do otherwise than make the order. As to the costs of this application, they may either be disposed of at the rehearing, or by me in Chambers after the rehearing. I will hear the parties (if desired) in respect of any matter of form, or any proposed variation which may be thought desirable in settling the order.

See Wyld v. McMaster, 4 O. R. 717.—**REP.**

A. H. F. L.

The plaintiffs afterwards appealed from the judgment of Ferguson, J., dismissing the action, to the Divisional Court, and the appeal was argued on February 12th, 1885. before Boyd C., and Proudfoot, and Ferguson, JJ.

S. H. Blake, Q. C., and *Cassels*, Q. C., for the plaintiffs. The statement of claim shews and the demurrer admits that the amount of the assessment on the plaintiffs' lands should be \$80,000, not \$243,321: that the lands were assessed for the year 1884 at \$157,488: that from this assessment the plaintiffs appealed to the Court of Revision of the municipality of Dysart, as being too high, the same property having been assessed the previous year at \$111,000: that a ratepayer of the municipality of the name of Frederick Dover, brother of the defendant James Dover, the Reeve of the municipality, at the same time appealed against the plaintiffs' assessment as being too low.

The statement of claim also shews and the demurrer admits that the several members of the Court of Revision, before their election as members of the Municipal Council of Dysart, had promised to raise the plaintiffs' assessment at the Court of Revision should they be elected to be members of the Municipal Council, which would constitute them under the statute members of the Court of Revision for the municipality : that a majority of the members of the Court of Revision, together with some of the officials of the Council, had, previous to the sitting of the Court of Revision, held a secret meeting and concocted a scheme, whereby other ratepayers of the municipality should be induced to appeal against their own assessment as being too high, so as to give the Court of Revision some justification for raising the plaintiffs' assessment.

The statement of claim also shews and the demurrer admits that it was arranged at the secret meeting that Frederick Dover should appeal against the plaintiffs' assessment as being too low, and the figures to which the plaintiffs' assessment should be raised were also fixed by the members of the Court of Revision present at the secret meeting.

It also appears in the same way that the Court of Revision really decided the appeal before they met as a Court.

The decision of the said Court of Revision is, therefore, void and invalid as being part of a pre-arranged scheme to raise the plaintiffs' assessment.

In consequence of the previous conduct of the members of the Court of Revision, there was no real Court of Revision that the plaintiffs could appeal to from the assessment of the assessor, the persons who constituted the Court not being persons who could properly form a Court, they having before the sitting of the Court, by their fraudulent conduct referred to, which was at the time unknown to the plaintiffs, disqualified themselves from sitting as impartial judges on the plaintiffs' assessment.

The whole of the proceedings before the Court of Revision being a farce, and a mockery, and a travesty

of justice, the plaintiffs did not have such a hearing before a Court of Revision as they were entitled to have, or as is contemplated by the Assessment Act, and the decision of the said Court is therefore utterly void and worthless.

There being, therefore, no *bonâ fide* decision by a competent Court of Revision, there was nothing for the appellants to appeal from to the Stipendiary Magistrate, and therefore they were not bound to appeal to him.

It is true that the Statute R. S. O. Ch. 6, Sec. 23 provides for an appeal to the Stipendiary Magistrate, but he could not grapple with the whole case, and the plaintiffs are not forced to go to him, but are entitled to come here and get the judgment of this Court to prevent the fraudulent scheme being carried out. It is not the assessment but the scheme they are fighting here: *Hedley v. Bates*, 13 Ch. D. 498. The Court does not care whether the remedy is by prohibition, injunction, or mandamus. If there is a wrong, they will apply the remedy. The Court will not limit the plaintiffs to the remedy they have asked, *eo nomine*, but will get to the justice of the case, and will grant the proper remedy. *Stannard v. Vestry of St. Giles, Cumberwell*, 20 Ch. D. 190, sustains *Hedley v. Bates*, *supra*, as far as we require it. [BOYD, C.—If your argument is well founded you have a defence to the collection of the taxes.] Yes; but we are not compelled to wait for that; we come at once to this Court to prevent further entanglements. [BOYD, C.—Should you not have appealed?] We have no judgment to appeal from. The whole thing is a fraudulent scheme; we put it broadly on that ground, and we come to equity to stop it. *Queen v. Lee*, 9 Q. B. D. 394, shows that if a magistrate has a substantial interest which might give him a bias he cannot act. If an arbitrator has made up his mind, or has consulted with one of the parties, it is a fraud on the other parties for him to sit and decide as disinterested: *Lord Auckland v. Westminster Local Board of Works*, L. R. 7 Ch. 597. See also *Harrison's Municipal Manual*, 4th ed., 632, 651, 666, 676. When a matter is based on fraud it is

never conclusive or final, and an assessment that is void *ab initio* need not be appealed against: *Nickle v. Douglas*, 37 U. C. R. 51. If a decree has been obtained by fraud it avails nothing: *Earl of Bandon v. Becher*, 3 Cl. & F. 479, at p. 500, 510 and 511. There has been no finding in this case, but a collusive scheme. A Judge in Court is not responsible, but if he conspires out of Court he is: *Calder v. Halket*, 3 Moore's P. C. 28, at p. 53; *Piggott* on Foreign Judgments, 2nd ed., 106, and the case of *Aboulloff v. Oppenheimer*, cited at p. 108. As to the fraud see *Udell v. Atherton*, 7 H. & N. 172, at 181. There is a difference between the powers of the Stipendiary Magistrate and a County Judge. R. S. O. ch. 6, sec. 23, which, governs this case gives an appeal to the Stipendiary Magistrate only against a *decision* of the Court of Revision, while R. S. O. ch. 180, sec. 59, which governs ordinary cases, gives the County Judge much more ample powers. [FERGUSON, J.—Would that have any bearing on this case?] Certainly. There was no decision in this case. The plaintiffs would have had to go to an appeal on the question before the Court of Revision, and they could not have shown that that Court could not judicially hear the case through fraud. If a judgment is voidable, a litigant may have to go to an appellate court to set it right; but if it is void he is not forced to appeal against it, although he may if he desires: *Duchess of Kingston's Case*, 20 Howell's State Trials, 544; *Smith's* L. C. 8th ed., 749; *Camwell v. Sewell*, 3 H. & N. 617, at 646; *Rogers v. Hadley*, 2 H. & C. 227; *Wylds v. Russell*, L. R. 1 C. P. 722, judgment of Willes, J.; *Price v. Dewhurst*, 8 Sim. 279; *Philipson v. Earl of Egremont*, 6 Q. B. 587, at 605; *Queen v. the Commissioners, &c. of Cheltenham*, 1 Q. B. 475; *Churchwardens, &c., of Birmingham v. Shaw*, 10 Q. B. 868; *Berlin v. Grange*, 1 E. & A. R. 285. If there is no distinction between being void for want of jurisdiction and for fraud, the facts as to the fraudulent scheme may not have come to light until it was too late to appeal, when the plaintiffs would be barred of their right of appeal,

surely they cannot be left without a remedy. *The Chicago, &c., R. W. Co., v. Cole*, 75 Ill. 591; *Merrill v. Humphrey*, 24 Mich. 170; *Lefferts v. The Board of Supervisors of Calumet Co.*, 21 Wis. 697; *The Milwaukee Iron Co. v. The Town of Hubbard*, 29 Wis. 56, 57, 58; *Squier v. Wilson*, 15 C. P. 284; *Webster v. Read*, 11 Howard, 437; *Carpenter v. Hart*, 5 Cal. 406. The assessment is illegal if the lands are assessed *en bloc*, and, although the statute says the assessment is final, if not appealed from, still if the lands were sold for taxes under such an assessment the Court would set aside the sale on the ground of the bad assessment. [PROUDFOOT, J.—A good case on that point is *Fleming v. McNabb*, 8 A. R. 656.] Yes; and *Hill v. Macaulay*, 6 O. R. 251. Then as to the question of costs. The defendants went to trial on a defence raised by pleadings, and they only demurred at the trial, and the plaintiffs should not be ordered to pay any more costs than if the demurrer had been put upon the record in the first instance.

McCarthy, Q. C., and Hudspeth, Q. C., for the defendants. When the plaintiffs' assessment was raised by the Court of Revision there was no necessity to resort to any other Court than that of the Stipendiary Magistrate. The Court of Revision is constituted by Sec. 47 of the Assessment Act, R. S. O. ch. 180. Sec. 49, provides for the oath of office; under sec. 53 the Court meets and tries. Sec. 56 deals with the lists, proceedings and trials. It is not compulsory that the assessor should be heard upon oath. Sec. 57 provides that the rolls shall be valid and bind all parties concerned notwithstanding any error, &c. The Court of Revision amended the roll on the 31st May, or we must presume they did, and then they were *functus officio* so that they could not be restrained by injunction on the 11th June from doing what they had already done. The injunction here goes further, it restrains the enforcement of the assessment. The municipality have no power or control over the roll after it is revised, and they cannot alter or change it. They use it to strike their rate. This

Court is really asked to vacate a judgment obtained by F. Dover, who is not a party to this suit. His judgment reduces his assessment by increasing the plaintiffs, and he cannot be affected by these proceedings. [PROUDFOOT, J.—On the same ground you might say all the residents of the township should be made parties]. No, Dover would be sufficient, but he should be represented. The proper remedy is, to bring the matter up by *certiorari*, and quash the proceedings; and we contend this Court has no jurisdiction. When the Court of Revision decides on an increase of an assessment the Court has nothing further to do; but the clerk alters the roll. This action is to prohibit a Court from carrying out a decision, and is different from *Hedley v. Bates*, 13 Ch. D. 498, cited by my learned friends, where the Court was already seized of the case. *Barker v. Palmer*, 8 Q. B. D. 9, decides that the proper remedy is an appeal from the decision and not a motion for *prohibition*: *Queen v. The Local Government Board*, 9 Q. B. D. 600, and 10 Q. B. 309. In *Ex. parte Wake*, 11 Q. B. D. 291, it was held that the applicant was not entitled to a *certiorari*. The difference between *prohibition* and *certiorari* is, that the former is before the judgment, and the latter after. In *Queen v. Lee*, 9 Q. B. D. 394, the *certiorari* was granted because one of the magistrates was interested, and could not sit. This Court should leave this case to go to the tribunals provided by the Legislature, and if relief can be had, will not interfere by *prohibition*; *Yates v. Palmer*, 6 D. & L. 283. In *Re Denton v. Marshall*, 1 H. & C. 654; *Buggin v. Bennett*, 4 Burr. 2,035; *Full v. Hutchins*, Cowp. 422, Com. Dig. 7 “*Prohibition*” D. The assessment of the whole township is stopped by this injunction. There is nothing to show that the facts in this case came out after it was too late to appeal to the stipendiary magistrate: *Great Western R. W. Co. v. Rogers*, 27 U. C. R. 214; *Re McLean and the Corporation of the Township of Ops*, 45 U. C. R. 335. There could have been ample relief by the appeal, and therefore this Court will not interfere. This judgment on the pleadings was

voidable only, and not void: *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 785. Fraud, it is said, vitiates anything; but take the case of a contract, a party may ratify it if he chooses. The same rule applies to judgments: *Clough v. The London and N. W. R. Co.*, L. R. 7 Ex. 26; *Wyldes v. Russell*, L. R. 1 C. P. 722. There is no evidence to support a corrupt motive. When assessments have been made of property that could not be assessed the assessment is void: *Scragg v. The Corporation of the City of London*, 26 U. C. R. 263; *The Municipality of the Township of London v. Great Western R.W. Co.* 17 U. C. R. 262; *Nicholls v. Cumming*, 1 S. C. R. 395; *The Queen v. The Court of Revision of the Town of Cornwall*, 25 U. C. R. 286; *The Township of Walsingham v. The Long Point Co.*, 5 P. R. 279. In *Re Ronald and the Village of Brussels*, 9 P. R. 232. In the American cases, the collectors were proceeding to collect the taxes, and if that was the case here the plaintiffs only would be affected; but the proceedings in this action completely paralyze the whole municipal assessment of the township as they cannot settle their rate. [BOYD, C.—Does not the same rule apply to municipal governments that applies to secret societies, where they have their own rules of government, and must carry them out before they come to this court?] Yes, and the cases of *Essery v. Court Pride of the Dominion*, 2 O. R. 596, and *Dawkins v. Antrobus*, 17 Ch. D 516, show that.

BLAKE, Q. C., in reply. *Ledyard v. McLean*, 10 Gr. 139, shows that this Court will deal with exigencies as they arise.

March 21, 1885. BOYD, C.—The question in appeal is to be disposed of as on a demurrer to the statement of claim, and it lies within a narrow compass. The plaintiffs complain of an exorbitant valuation of lands for the purposes of municipal assessment by the local Court of Revision, and aver that this result was arrived at by a preconcerted scheme among the councillors.

composing that Court. It is alleged that they were so interested as to disqualify them from being judges, and that they fraudulently and corruptly decided as they did. The plaintiffs seek to remove the whole matter touching the ascertainment of the proper taxable value into this Court, and to enjoin the municipal authorities from enforcing any rate beyond one based on a value of \$80,000. The claim of the plaintiffs to the interference of this Court is not an absolute right, but one resting on judicial discretion, and in my opinion that discretion was rightly exercised by dismissing the action. I need not repeat the reasons given by Mr. Justice Ferguson, with which I agree. Conceding that the decision of the Court of Revision was a fraudulent one, and that it is vitiated by fraud, that is a ground which can be properly advanced to procure its reversal before the Stipendiary Magistrate. It must be assumed that a competent and impartial appellate tribunal is to be found in him before whom the matters complained of may be adjusted speedily and inexpensively. He has power to deal with the matters in question in the most ample manner. He is not limited to evidence already given in the earlier steps of the investigation; but can receive evidence of all parties, and "all other persons whatsoever," R. S. O. ch. 180, sec. 61. The appellants in a case like this need not be hampered or in any way embarrassed by the previous determination of the members of the Court of Revision. Their very course of proceeding if verified in evidence would afford the strongest argument for disregarding their conclusions, and would coerce an impartial tribunal into an independent investigation in order to fix the proper basis of taxation. The statute intends that the value of lands shall be fixed by the municipal authorities, and not till all statutory means have been exhausted, should recourse be had to this Court for relief. It is to be inferred upon this demurrer that the proper value of the lands could have been ascertained by and before the Stipendiary Magistrate. Why then should an expensive chancery action be resorted to in order to reach the same result? Can such a result be

attained in this action, and by the machinery of this Court? Are all the proceedings in the municipality in order to complete the assessment roll, and to strike the rate and to proceed to its collection, to be suspended till the Chancery action is tried, probably in the next municipal year?

The scheme and scope of this action is in effect to seek a *prohibition* against the Court of Revision proceeding any further, and to remove the matter of the assessment by way of *certiorari* to this Court. If the finding of the Court of Revision is quashed that leaves the original assessment, at \$157,488, still in force. The appeal from this cannot be sent back to be properly adjudicated upon, for according to the plaintiffs' pleadings all the council are corrupt. Is it then expedient or reasonable to ask this Court to become subsidiary to the appellate tribunal created by Parliament, and to undertake the duty of disposing of these appeals, when all can be summarily and effectually done by the the Stipendiary Magistrate? No authority has been cited for such a course, and I do not think one should be made in this case: *Attorney General v. The Corporation of Lichfield*, 11 Beav. 132. I find decisions bearing decidedly against such interference by the Superior Court until all subordinate tribunals have been tried, among which I may refer to *Rex v. Justices of Somersetshire*, 1 D. & R. 443; *Colonial Bank of Australasia v. Wilen*, L. R. 5 P. C., p. 450; *Plunkett v. Lord Burlington*, 1 Jur. 376; See also *High on Extraordinary Legal Remedies*, par. 770 and 771.

Upon the question of costs I find myself unable to agree with the decision in appeal. All costs have been given though the matter went off upon a demurrer *ore tenus*. The defendants did not place a demurrer upon the record though they might have done so, and had they done so, it would have been competent for either party to have had this preliminary question of law argued and disposed of before the trial. The defendants are to blame for not having thus demurred, and they should not be allowed to withhold a demurrer, and reap large costs thereby, which

would not in all probability have been incurred had they by their pleadings notified the plaintiffs that they would object to the plaintiffs' right to litigate. The facilities afforded by the Judicature Act for demurring, in whole or part, to the pleadings of the opposite party, and for disposing of such demurrers at an early stage in the action, are strong arguments against awarding more costs than if the party raising the legal objections had formally demurred.

The later English cases are distinguishable from this. The ground of objection in law did not in them present itself so obviously as to make it reasonable to demur, and risk all upon that line of defence, and the actions were litigated through to the end without any preliminary question of law being stated. Each case must rest upon its own circumstances and peculiarities: *Simpson v. Grant*, 5 Gr. 273.

I think costs of the motion for injunction should be given to the defendants, as in *Barnsley v. Twibell*, 7 Beav. 31, and further costs should be given thereafter as if the defendants had successfully demurred. To this extent the judgment in appeal should be modified, but the costs of this appeal are to be given to the defendants.

PROUDFOOT, J.—When this case came before me on a motion for an injunction the allegations with regard to the conduct of the members of the Court of Revision were such that it seemed to me proper to have them inquired into.

The defendants at the hearing did not go into evidence to establish the truth of the defence they have placed on record, but demurred *ore tenus* to the statement of claim, a demurrer that was allowed by my Brother Ferguson. The demurrer was on the ground that this Court had no jurisdiction to entertain what was said to be practically an appeal from the Court of Revision; that the proper remedy in such a case was to appeal to the Stipendiary Magistrate.

The Assessment, Act R. S. O. ch. 180, sec. 59; provides for an appeal to the County Court Judge, not only against

a decision of the Court of Revision on an appeal to that court, but also against the omission, neglect, or refusal of that court to hear or decide an appeal.

The special Act for the Territorial Division of Haliburton, R. S. O. ch. 6, sec. 23, gives an appeal to the Stipendiary Magistrate instead of the Judge of the County Court against any *decision* of the Court of Revision, and he is to have the like powers in respect of such appeals as are performed by the County Court Judge in other counties. The power of the Stipendiary Magistrate is thus more limited than that of the County Court Judge, as it does not extend to the omission, neglect or refusal to decide.

Section 61 of the Assessment Act gives power to the County Judge to take evidence upon oath, and to compel the attendance of witnesses, and the 65th section makes his decision final.

The demurrer admits the material facts of the statement of claim to be true.

The statement of claim alleges that the Court of Revision was composed of the defendants, James Dover Robert McKelvie, Sanford McEvers, Thomas Moon, and Joshua Paul; that the plaintiffs appealed against the assessment of their property at \$157,488 as too high; and that Frederick Dover, a brother of the defendant James Dover, at the same time appealed against the assessment of the plaintiffs as too low, without specifying any lands as being undervalued, but simply that the assessment of the plaintiffs' wild lands was too low. Some settlers also appealed against their own assessments of wild lands as too high. The defendants, James Dover, Robert McKelvie, Sanford McEvers, Thomas Moon, and Joshua Paul, are the only councillors of the Municipality of Dysart, and as such formed the Court of Revision. At a meeting of the court on the 31st May, 1884, the plaintiffs gave evidence showing that their lands had been assessed the previous year at \$111,095, and since then a good deal had been sold, and their estate was not as valuable in 1884 as the previous years. No evidence was given by anyone in support of the

appeal to raise the plaintiffs' assessment, nor was the assessor, who was in court, asked a single question on the subject. Frederick Dover stated that his wild lands in Dysart were assessed at \$1.25 per acre, while the plaintiffs' lands in Dysart were only assessed at \$1.00 per acre. No evidence was given of the value of the company's lands in the other townships, and no evidence was given of the value of any specific lands of the plaintiffs in Dysart or any other township. The Court of Revision then called upon those who had appealed against their own assessments, and it was stated to the court that they appealed because their lands were assessed higher than the plaintiffs, but no evidence was given to show that the plaintiffs' lands were of equal value to theirs, in fact no evidence was given. The Court of Revision at once decided to confirm the assessment of those who appealed because their assessments were too high, and to increase the assessment of the plaintiffs' lands to \$243,113.75, being an increase above the assessment of the previous year of \$132,073.75: that the plaintiffs have ascertained since the meeting that the defendant James Dover, who is Reeve of the township of Dysart, had previous to the sitting of the court settled on behalf of himself and the other members of the court the amount by which they would increase the plaintiffs' assessments in the several townships, and it was for this, among other reasons, that the increase was made on the plaintiffs' wild lands generally in each township, and not on any particular lot. The plaintiffs have also since ascertained that the defendants Dover, McKelvie, McEvers, Moon and Paul procured their election as councillors partly through signifying to the electors that if they were elected the plaintiffs' assessment would be increased: that previous to the meeting of the court a secret meeting of James Dover, John Young, the Treasurer of Dysart, William Priest, who is Clerk of Dysart, one Alexander Niven, Frederick Dover and other members of the Court of Revision was held, and it was arranged by them that the municipality should be canvas-

sed, and the settlers induced to appeal against their own assessments in order to give some ground for the Court of Revision to raise the plaintiffs' assessment. Some sixty appeals were procured to be made in pursuance of this conclusion, and the appeal by Frederick Dover against the plaintiffs' assessment was also arranged at that meeting.

The plaintiffs charge that from the whole action of the Court of Revision in this matter and of the individual members previous to the sitting of the court, that the said members had agreed among themselves, previous to the holding of the court, to increase the plaintiffs' assessment in the manner aforesaid, and that what took place at the previous secret meeting, and the procuring appeals to be brought by the settlers, and the appeal of Frederick Dover against the plaintiffs' assessment, and the action of the Court of Revision, were all parts of a fraudulent and improper arrangement and conspiracy entered into before the holding of the court by the members of the court in conjunction with Frederick Dover, Alexander Niven, John Young, and others, to increase the plaintiffs' assessment.

The members of the Court of Revision must necessarily be ratepayers, and so interested in raising the assessment of the company, but this is not such an interest as disqualifies them from adjudging upon these appeals.

The ratepayers however are entitled to have a fair and honest hearing, and the opinion of the court upon the evidence produced before them.

The foregoing statement of facts show that the action of the court was a mere travesty of a judicial proceeding; and the function of the court in this respect was judicial, to hear an appeal from the assessor and to decide whether he was right or wrong.

The election speeches on this subject were improper; the candidates did not say that the propriety of increasing the plaintiffs' assessment would be considered, which they might very well have done, but that the assessment would be increased. The secret meeting prior to the sitting of

the court, when a conclusion was come to as to the increase of the assessment and the mode of carrying it out, and the action of the court itself, in deciding in opposition to the only evidence given before them, appear to me to establish that the whole was a fraudulent arrangement by the members of the Court of Revision, by which they endeavoured to assess the plaintiffs' property at more than double its assessment in the previous year. And the defendants admit they did all this fraudulently.

There is no doubt of the general rule, that when a statute gives a specific mode of relief, and directs to whom an appeal must be made, and that his decision should be final, the mode pointed out by the statute must be pursued.

But to give the Stipendiary Magistrate jurisdiction the Court of Revision must have given a *decision*. The admission that the action of the court was fraudulent in effect determines that there was no decision. If it be held that a judgment is void when the court has been misled by the fraud of the litigants, *a fortiori* must it be void when the judgment is tainted by the fraud of the court itself. Of the many cases cited, I shall only refer to two, which seem to me to suffice for the disposal of this case.

In *Earl of Bandon v. Becher*, 3 Cl. & F. 479, 511, Lord Brougham quotes with approval a passage from the argument of Mr. Solicitor General Wedderburn in the *Duchess of Kingston's Case*, where a judgment had been obtained through the collusion of the litigants: "There is no judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious case proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." And as to the case before him Lord Brougham proceeds: "It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up." It was held in that

case that though the Court of Chancery cannot review or correct a decree of the Court of Exchequer, yet where such decree has been obtained collusively and fraudulently, a party whose interests are affected by it may raise, in the Court of Chancery, either as actor or defender, a question as to its validity.

In *Abouloff v. Oppenheimer & Co.*, 10 Q. B. D. 295, the same principle was held to govern where a judgment had been obtained in a foreign court through the fraud of the plaintiff, and the more recent cases are collected there, and Lord Coleridge cites with approval the language of DeGrey, C. J., in the *Duchess of Kingston's Case*, 2 Sm. L. C., 8th ed., 749, that "fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says: it avoids all judicial acts, ecclesiastical or temporal."

And if a judgment is vitiated and void from the corrupt and fraudulent acts of the litigants, shall it be said the corrupt and fraudulent acts of the judges themselves will not avoid it? It is a corruption of justice at its fountain. And a litigant has much more reason to complain of an unjust judge than he has of an unjust antagonist.

It was argued, however, that even if the decisions complained of were void, still there ought to have been an appeal to the Stipendiary Magistrate, who might investigate the matter and correct it. I do not think this was the kind of proceeding that the Legislature intended to come before that officer. His duty was not to inquire into fraudulent proceedings of the Court of Revision, but to consider whether an honest decision was to be revised. In the case of an alleged fraudulent judgment I do not think the jurisdiction of the Superior Courts is taken away.

It was then argued that if the decisions were void there was no decision, and that it was the case of an omission to decide, and that the Stipendiary Magistrate could take evidence and determine the matter himself. It is probable that the County Court Judge might do so, but the authority

to determine when there has been an omission to decide is not conferred on the Stipendiary Magistrate. His jurisdiction is confined to the case of an appeal from a decision.

Besides, it appears to me that if this Court has jurisdiction, as it certainly has where the acts complained of are vitiated by fraud, we cannot refuse to entertain the suit because the plaintiffs may have another and perhaps a more convenient remedy.

As the Chancellor agrees with the judgment of my Brother Ferguson, it will be affirmed, and I agree in the modification of it in regard to costs.

G. A. B.

NOTE.—The plaintiffs afterwards appealed to the Court of Appeal, but the appeal was dismissed. Pending a further appeal to the Supreme Court, a settlement was arrived at between the parties, the municipality agreeing, amongst other things, that the plaintiffs' assessment should be reduced to a little over \$73,000, and to pay all the costs of this action as between solicitor and client. In the meanwhile 48 Vic. ch. 42, O., was passed, by sec. 16 of which the law as to appeals from Courts of Revision is altered.—REF.

[CHANCERY DIVISION.]

HAMMILL ET AL. V. HAMMILL ET AL.

Will—Construction—“Effects.”

A testatrix by her will, after giving to her two sons a certain mortgage, and after sundry other specific bequests, continued: “I further direct that the balance of personal property, consisting of notes and other securities for money, be given to my two sons aforesaid * * also that if there be any effects possessed by me, at the time of my decease, that the same may be divided equally in value among my grandchildren share and share alike.”

The testatrix had no real estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and other funds in the purchase of land of which she died seized.

Held, affirming the decision of Proudfoot, J., that the grandchildren were entitled to the said lands, as well as to the personal estate, of which the testatrix died seized and possessed, not specifically disposed of by the will.

THIS was a motion by way of appeal by the plaintiffs from the judgment of Proudfoot, J., reported 6 O. R. 681.

C. Moss, Q. C., for the plaintiffs. “Effects” standing alone means only personal effects: *Camfield v. Gilbert*, 3 East 516. The meaning to be attached to effects depends upon the context. If it appears that it is intended to be confined to personal property, it will be so confined, but if it appears to have been meant to include real property, it will be so construed: *Smyth v. Smyth*, 8 Ch. D. 561. See also *Jones v. Robinson*, 3 C. P. D. 344. *Jarman on Wills*, 5th Am. ed., vol. 2, p. 315, *seq.*, collects the cases.

J. Maclellan, Q. C., for the defendants. If “effects” is large enough in itself to cover real estate, the appellants must shew there is something which cuts down its meaning. The authorities are clear that “effects” is sufficient unless qualified to include real estate: *Marquis of Titchfield v. Horncastle*, 7 L. J. Ch. 279; *S. C.* 2 Jur. 610; *Milsome v. Long*, 3 Jur. N. S. 1073. These two cases give us the authority of Lords Langdale and Hatherley. *Smyth v. Smyth*, 8 Ch. D. 561, follows this last case. We must succeed unless the qualifying word “personal” in the first

member of the sentence, is to be carried into the second. *Jones v. Robinson*, is an illustration of a qualifying word being used. I would refer also to *McKidd v. Brown*, 5 Gr. 633; *Doe d. Evans v. Evans*, 9 A. & E. 719; *Wilson v. Major*, 11 Ves. 205. There is nothing here to restrict the meaning of "effects."

C. Moss, Q. C., in reply. As to "effects" *ex vi termini* carrying real estate, the words of Lords Langdale and Hatherley are mere *dicta*. *Doe d. Hick v. Dring*, 2 M. & S. 447, is direct authority the other way. *Doe d. Hoare v. Earles*, 15 M. & W. 450, cites the *Titchfield* case. It was held the remainder in fee did not pass with "effects."

December 18th, 1884. BOYD, C.—I am of opinion that the words in this will, "also if there be any other effects possessed by me at the time of my decease," are comprehensive enough to carry any lands owned by the testatrix at her death. According to some of the dictionaries "effects" means "things attained, acquired, possessed": *Richardson's dict.*; and in *Wharton's law dictionary* "property" is given as the first meaning. In the earlier cases there is much conflicting opinion among the Judges as to the primary and proper meaning of this word. Lord Mansfield, in 1775, said: "I take effects to be synonymous to worldly substance, which means whatever can be turned to value," and he defined "substance" as, every property a man has: *Hogan v. Jackson*, Cowp. 304, 307. In 1808 Sir Wm. Grant adopted Lord Mansfield's definition of "effects," as meaning property or worldly substance in *Campbell v. Prescott*, 15 Ves. at p. 507, and with them agreed Lord Langdale, in *Titchfield v. Horncastle*, L. J. 7 Ch. 279, who there thus expressed himself: "I am not aware that the word *effects* may not be as applicable to real estate as to personalty."

In the *King v. Aslett*, 1 B. & P. N. R. 12, Lord Alvanley said, that "the word effects is a very large and general term, and is confined to no particular description of property either in specie or value."

On the other hand *Doe d. Hick v. Dring*, 2 M. & S. 448, (1814), is the first decision upon the neat point that the word "effects" unaided by the context includes only things personal and will not *per se* pass realty. *Dicta* to that effect had been before this reported in *Camfield v. Gilbert*, 3 East. at p. 521 (1803), where Lord Ellenborough said that effects in its natural signification means personal effects, and Le Blanc, J., said that effects standing alone must certainly be taken to mean personalty.

The decision in *Doe d. Hick v. Dring*, was accepted and followed by Gifford, M. R., in *Henderson v. Farbridge*, 1 Russ. 479 in 1826, and by the majority of the Court of Exchequer in *Doe d. Haw v. Earles*, 15 M. & W. 450 in 1846.

The argument of Holroyd (afterwards Judge,) in *Doe d. Hick v. Dring*, was very forcible and has really prevailed in more modern decisions. It is thus reported at 2 M. & S. 450: "Effects, in its etymology is derived from *efficio*, to accomplish, and means such things which a man has gained or acquired, and in a more general sense, which he hath. It is synonymous with a man's substance or all he is worth; and a devise of all he is worth has been held *per se* to pass the real estate." *Huacop v. Brooman*, 1 Bro. C. C. 437.

Thus we find in 1857 a direct decision opposed to *Doe d. Hick v. Dring*, by Sir John Romilly, in *Phillips v. Beal*, 25 Beav. 25, who held that a division of "the whole of a man's effects," is sufficient to pass the real estate. Again in the same year there is a decision having the same tendency of Wood V. C., in *Milsome v. Long*, 3 Jur. N. S. 1073. *Doe d. Hick v. Dring*, was expressly dissented from in 1876, by Malins, V.C., in *Glover v. Chancellor*, referred to in 8 Ch. D. pp. 563, 565, (also noted W. N., '76, p. 152), and again two years later in the reported case of *Smyth v. Smyth*, 8 Ch. D. 561. The rules of construction laid down in that case, which Proudfoot, J., has followed, and the interpretation then given to the word "effects," are without going into more recondite law sufficient to sup-

port the judgment now under review. The earlier authorities, now to be treated as over-ruled, influenced by a canon of construction then deemed sacred, leaned strongly against the disherison of the heir, whereas the later decisions proceed upon a contrary principle, and lean strongly against any construction that involves intestacy.

A case not cited during the argument decided in 1880, (two year later than *Smyth v. Smyth*,) affords evidence that the Lords of the Privy Council take the same view as Sir Richard Malins of the scope of the word "effects" *per se* in a testamentary instrument. In *The Attorney-General for British Honduras v. Bristowe*, L. R. 6 App. Cas. 143, at p. 149, Sir Montague Smith is thus reported: "It has been urged that the word "effects" would not carry "Grant's work," if that were to be treated as landed property . . . Their Lordships think that the word "effects" would pass land."

I agree generally with the judgment of Proudfoot, J. I see no difficulty in reading the clause of the will in question which I have already quoted, as quite distinct from, and not controlled by the earlier words relating to the "balance of personal property." The judgment should be affirmed, with costs.

FERGUSON, J.—Mr. Justice Proudfoot followed *Smyth v. Smyth*, 8 Ch. D. 561. I think he was right, and that the judgment should be affirmed, with costs. All the cases cannot, I think, be reconciled.

A. H. F. L.

[CHANCERY DIVISION.]

WILLIAMS V. ROY ET AL.

Will—Charitable legacy—Uncertainty—Division among rival claimants—Gift to benevolent institutions in general of a specified place—Construction—Executors—Compensation fixed by will—37 Vic. c. 9—R. S. O. c. 107, secs. 36-41.

G. W. by his will bequeathed \$1,000 to "The Protestant Orphans' Home for Boys in Toronto." The evidence shewed that there were two institutions, either of which might have been intended by the testator.

Held, that the legacy should be divided between them.

G. W. also bequeathed to "the Benevolent Institutions and Charities of Owen Sound, \$1,000, to be distributed as my executors shall deem meet."

Held, that the testator intended a bequest to the Municipal Corporation of Owen Sound, to be distributed as the executors should direct.

G. W. also by the said will directed his executors "to retain for their own use and benefit the sum of \$200 each, in lieu of all charges for their services in performing the duties imposed on them as executors of this my will."

Held, that under no circumstances could the executors who had accepted probate claim a larger sum than the amount specified as compensation for their services.

Denison v. Denison, 17 Gr. 306, doubted.

Semble, that if an executor refused otherwise to act, and if it was found impracticable to deal with those entitled to the assets, the Court would have jurisdiction to permit the compensation given by the statute to be awarded to him on condition of his relinquishing what was given to him by the will.

THIS was an action for the administration of the estate of George Williams, deceased, who died on September 21st, 1876, leaving a will dated October 29th, 1875, whereby he first bequeathed certain pecuniary and specific legacies, amongst which were the following :

"I give and bequeath to the Protestant Orphans' Home for Boys in Toronto the sum of \$1,000, to be paid to the manager thereof for the benefit of the Institution. I give and bequeath to the Orphan Girls' Home in Toronto the sum of \$1,000, to be paid to the manager thereof for the benefit of the Institution. I give and bequeath to the Benevolent Institutions and Charities of the town of Owen Sound \$1,000, to be distributed as my executors shall deem meet, and as soon after my death as they can find it convenient."

He then proceeded as follows :

"I hereby authorize and direct my said executors to sell and convert into money either by private sale or public auction, or partly by private sale and partly by public auction, all my real and personal property of

every nature and kind not hereby specially devised or bequeathed, and to retain for their own use and benefit the sum of \$200 each in lieu of all charges for their services in performing the duties hereby imposed on them as the executors of this my will, and to pay all my just and lawful debts, funeral and testamentary expenses, and all the legacies hereby bequeathed, and otherwise perform the directions of this my will."

He then appointed W. Roy and D. Christie his executors.

The plaintiff, who was the testator's widow, alleged in her statement of claim that the executors declared themselves unable to fully administer the estate without the direction of the Court: submitted that the charitable bequests were void for uncertainty, there being more than one charitable institution in Toronto both for boys and girls designated as in the said will and there being no organized benevolent or charitable institutions in the town of Owen Sound: and she claimed administration of the estate by the Court.

The defendants were the executors, the Attorney-General of Ontario, the Boys' Home of the city of Toronto, the Girl's Home and Public Nursery of the city of Toronto, and the Orphans' Home and Female Aid Society, also of the city of Toronto.

The action came on for trial at Owen Sound on March 17th, 1885, before Boyd, C.

Lane, Q.C., for the plaintiff.

Creasor, for the executors.

Lash, Q. C., for the Attorney-General of Ontario, the Girls' Home, and the Boys' Home.

Greer, for the Orphans' Home.

Evidence was given that the Boys' Home was for destitute boys, not exclusively orphans: that as a rule the boys admitted had lost one or both parents; and as a rule neither parent contributed to their support: that it was altogether a Protestant institution, though, as an exceptional thing, a Roman Catholic was sometimes admitted: that the

Board was composed entirely of Protestants: that there was an institution in Toronto called the House of Providence which was a Roman Catholic institution and took in both boys and girls: that the Girls' Home and Public Nursery was always called the Girls' Home, and provided for girls in the same sort of way as the Boys' Home did for boys, and was of the same Protestant character: that the Boys' Home was called the Protestant Orphans' Home in familiar parlance: that there was no institution in Toronto called the Protestant Orphans' Home for boys: that the Orphans' Home and Female Aid Society was almost always known as the Protestant Orphans' Home: that it was for boys and girls: that children of all denominations were accepted by it, and all brought up as Protestants: that the managers were from all denominations: that preference was given to those who were orphans as to both parents: that there was generally a greater proportion of boys in it than girls, but they were about in equal numbers: that on two separate occasions the testator had, while in Toronto, spoken well of the Boys' Home: that the Municipal Council of Owen Sound had a benevolent fund which was used every year for benevolent purposes.

On the argument the following were referred to: 46 Vic. ch. 18, sec. 482, sub-sec. 12; *Ib.* sec. 50; *Gillies v. McConochie*, 3 O. R. 203; 24 Vic. ch. 114, sub-sec. 12; 14-15 Vic. ch. 34; 36 Vic. ch. 151, O.; *Bennett v. Hayter*, 2 Beav. 81; *Re the Clergy Society*, 2 K. & J. 615; 1 *Jarm.* on Wills, 4th ed., vol. i., p. 376.

BOYD, C., held that by the "Orphan Girls' Home in Toronto," the testator clearly intended the Girls' Home and Public Nursery, and they were entitled to the whole legacy of \$1,000; but that there being doubts as to whether the testator meant the Boys' Home or the Orphans' Home by the "Protestant Orphans' Home in Toronto," that bequest should be divided equally between those two institutions: that by the bequest to the charities of

Owen Sound the testator intended a bequest to the municipal corporation of Owen Sound, to be distributed as the executors should direct; and said that the executors' accounts might be submitted to the plaintiff and the other parties, and referred to the Master if any one desired it; and reserved further directions.

Afterwards by agreement between all the parties the following special case was submitted to the learned Chancellor :

"The will in question in this action contained the following clause :

'I hereby authorize and direct my said executors to retain for their own use and benefit the sum of two hundred dollars each, in lieu of all charges for their services in performing the duties imposed on them as executors of this my will.'

The executors have each received the sum of \$200, and they claim to be entitled between them to receive as a compensation the further sum of \$580.

It is admitted that the amount thus claimed would be a proper sum for the executors to obtain in addition to the \$400 mentioned in the will, if they are not precluded from making any further claim by the above clause in the will.

The parties interested agree to submit the question of the executors' right to the Honourable the Chancellor of Ontario, and agree to the question being argued before the Honourable the Chancellor at Osgoode Hall, Toronto, on Saturday the 30th day of May instant, who is to be considered as exercising the jurisdiction of a Judge of a Surrogate Court as well as that of a Justice of the High Court in the premises."

This came up for argument on May 30th, 1885.

Lash, Q. C., for the Girls' Home.

H. Murray, for the Orphans' Home.

A. H. F. Lefroy, for the Boys' Home.

N. Hoyles, for the executors.

The following were cited : *R. S. O.* ch. 107, secs. 36-41 ; *Denison v. Denison*, 17 Gr. 306 ; *Boys' Home of the City of Hamilton v. Lewis*, 4 O. R. 18 ; *Perry on Trusts*, 2nd ed., Vol. 2, sec. 919 ; *College of Charleston v. Wellington*, 23 Rich. Eq. (S. C.) 195 ; *Lewin on Trusts*, 7th ed. p. 541 ; *Freeman v. Fairlie*, 3 Mer. 24 ; *Kennedy v. Pingle*, 27 Gr. 305.

June 10th, 1885. BOYD, C.—Out of deference to *Denison v. Denison*, 17 Gr 306, I have had doubts as to the proper manner of disposing of this case ; but my conclusion is adverse to the executors' claim. *Denison's Case* may have been rightly decided as it was and when it was, in 1870, but I should hesitate now to follow it, even in a case where the language of the will was identical with the will there under consideration. Here the testator's language is very precise, and in these words : " I hereby authorize and direct my executors to retain for their own use and benefit the sum of \$200 each in lieu of all charges for their services in performing the duties hereby conferred on them as executors of this my will." It was thought that the language used in the *Denison* will did not import that "compensation" was thereby intended ; no such doubtful meaning can be attached to the clause I have quoted. In 1874, the Legislature passed an Act relating to the compensation of trustees and executors (37 Vic. c. 9) in which the principle is laid down that the Court is not to fix the allowance where the testator has himself provided what it shall be. That is a most reasonable rule, and one of general application, one indeed to which the Court should give effect without requiring a parliamentary declaration as to its propriety. The testator stipulates what shall be paid to the executors, and they, knowing the terms accept probate and thereby accede to what is offered as their compensation. No such disastrous consequences will follow from this line of decision as were suggested during the argument. If the executors named do not like the terms they need not act ; if they do not act there will be

no difficulty in getting as administrator one or other of the beneficiaries under the will. That is one solution, if the executor does not act. Another is, that if any special reason exists for inducing the executor named to take out probate, and the terms of compensation in the will are inadequate, he may bargain with those interested for the statutory allowance, as a condition of acting. No possible objection could be made to such an arrangement, and it was a common device in former days when no payment to trustee or executor was allowed, to make a prior bargain with the beneficiaries. The Court was jealous in sanctioning such bargains and scrutinized them strictly, but the necessity for such supervision would not apply where only what the statute sanctioned was claimed. A possible case may arise where no administrator can be got to act, and where it is impracticable to deal with those entitled to the assets. I do not doubt in such a case (in order to prevent destruction and loss), that the Court would have jurisdiction to permit the compensation given by the statute to be awarded to the executor on condition of his relinquishing what is given to him by the will, but such an application should be as a rule before probate, and very clear proof should be made as to the inadequacy of what is fixed by the will.

No order will be made for further compensation to these executors. Costs of all parties will be fixed by the registrar, and may be deducted out of the fund in hand.

I may just note that I have disposed of this application on broad grounds. I do not rest on the letter of the statutes. Some difficulty would arise if a literal reading were given to the law as found in R. S. O. ch. 107, secs. 36-41. These sections should be read as all *in pari materia* though it is rather unfortunate phraseologically, that section 39 should be limited by the revisors to the three preceeding sections, and that the definition of "trustee" as meaning "executor," in section 36 should be limited to the four following sections, in three of which that word does not appear. It would be absurd so to

read the law as to fetter this Court by the sections which are grouped under the heading "*Allowance to Trustees*," and leave the Surrogate Judge under section 41 to pass by the rate of compensation fixed by the will, because that section is entitled "*Allowance to Executors*." The intention of the whole law is too plainly manifest to be disregarded and the principles laid down in the statute should equally apply to all forums and Courts dealing with the same subject-matter.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA V. ARSCOTT.

Vagrant Act—Construction of—Crime—Warrant of commitment—Appeal to Sessions—Subsequent warrant of convicting magistrate—R. S. O. ch. 70—Jurisdiction under—Habeas corpus—Certiorari—Marking writ in margin—Effect of.

The Vagrant Act, 32 & 33 Vic. ch. 28, D., declares certain persons or classes of persons to be vagrants, amongst others, "all common prostitutes or night walkers wandering in the fields, public streets, or highways, lanes, or places of public meeting, or gathering of people, not giving a satisfactory account of themselves, all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves;" and "shall upon conviction be deemed guilty of a misdemeanour, and punishable," &c.

Held, that the Act does not, on its true construction, declare that being a prostitute, &c., makes such persons liable to punishment as such; but only those who when found at the places mentioned, under circumstances suggesting impropriety of purpose, on request or demand are unable to give a satisfactory account of themselves.

On the conviction of the prisoner herein she was committed to custody under a warrant issued by the convicting magistrate. She gave bail and was discharged from custody under 33 Vic. ch. 27, sec. 1. On the appeal being heard, the prisoner was found guilty and the conviction affirmed, and the prisoner directed to be punished according to the conviction. No process was issued by the Sessions for enforcing the judgment of the Court, but a new warrant was issued by the convicting magistrate under which the prisoner was retaken. Writs of *habeas corpus* and *certiorari* were issued, and on the return thereof a motion was made for the discharge of the prisoner. In the margin of the writ of *habeas corpus*, it was marked "per" 33 Car. 2, which was signed by the Judge issuing it.

Held, that the prisoner was not in custody or confined under the judgment of the Sessions, but under the warrant of the convicting magistrate; and, *Seemle*, under the circumstances, the convicting magistrate was *functus officio*, and therefore could not issue the warrant in question, which should have been issued by the Sessions; and possibly they could have directed punishment for the unexpired term; but that if no bail had been given, and the prisoner had remained in custody, no further order of commitment would have been necessary, or if no warrant of commitment had been issued prior to appeal, the magistrate could have issued one thereafter.

Held, also, there was power to act under R. S. O. ch. 70, and so a Judge in Chambers could deal with the motion: that marking the writ as under the Statute of Charles, did not prevent the learned Judge so acting under ch. 70, or at common law; and as no offence was declared the prisoner was directed to be discharged on the *habeas corpus*.

Held, also, that under a *certiorari* the conviction might be quashed; and, as the judgment of the Sessions confirmed the conviction, it would probably fall with it.

THIS was a motion made on the return of the writs of *certiorari* and *habeas corpus* issued herein for leave to file said return, and for the discharge of the prisoner.

The conviction was for unlawfully keeping a certain bawdy house and house of ill-fame for the resort of prostitutes, and being a vagrant within the meaning of the statute entitled "An Act Respecting Vagrants."

On May 26, *Osler*, Q. C., and *R. M. Meredith* supported, the motion.

Aylesworth and *McKillop*, contra.

May 29, 1885. ROSE, J.—The Act in question is 32-33 Vic. ch. 28, (D.), which declares certain persons or classes of persons to be vagrants and subject to punishment on summary conviction.

Amongst others are "all common prostitutes, or night walkers wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, *not giving a satisfactory account of themselves*—all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, *not giving a satisfactory account of themselves*."

I yield to Mr. Osler's argument, and hold that this Act does not declare that being a prostitute, night walker, keeper of a bawdy house, or a frequenter of such a house, makes a person a criminal liable to punishment as such, but merely declares that persons of such classes, against whom society must be protected, when found at such places, and under such circumstances as suggest to the conservators of public peace and morality, suspicion of impropriety of purpose, and who on request or demand are unable to give a satisfactory account of themselves, "shall be deemed vagrants, loose, idle, or disorderly persons within the meaning of this Act, and shall upon conviction * * be deemed guilty of a misdemeanor and be punished" as pointed out by the statute.

By way of illustration: If any one of these classes be found on the street after night fall, and a policeman thought that the prostitute, or night walker was out for the purpose of prostitution, or the bawdy house keeper, to entice men or girls to her house, or the frequenter with any improper motive, he might, under this statute, at once demand an account of the purpose for which they were there, and if no satisfactory account were given, at once take such person into custody. If, however, upon such demand it appeared that the purpose was quite proper, then no cause for arrest would exist under this statute.

The object of the statute seems to be to give to the police the power to remove such persons from places where they might be offensive or dangerous to the public, and to throw on them the onus of explaining the purpose or reason why they were in such places.

I am the more convinced that this is so, because during the same session the Legislature passed ch. 32, providing for punishing keepers, inmates or habitual frequenters of bawdy houses. See sec. 2, sub-sec. 6.

It was argued that the words "not giving a satisfactory account of themselves" in ch. 28, only applied to "persons in the habit of frequenting such houses." Such a construction would require the same words to be confined to night walkers in the preceding clause, in which event "all common prostitutes," as such, would be vagrants wherever found, even if they could give ever so satisfactory an account of why they were where found, while "night walkers" wandering in the fields, &c., would not be vagrants unless a satisfactory account were demanded and refused.

I think, therefore, the warrant discloses no offence against any law or statute.

There were four different warrants produced, issued one after the other for purposes which I am saved the necessity of considering, as each of them is founded on the one conviction for the alleged offence, and all are therefore invalid.

I have now to consider Mr. Aylesworth's objection to my jurisdiction to interfere.

The writ of *habeas corpus* was marked in the margin.

"Per Statutum tricesimo primo Caroli Secundi Regis.

"JOHN E. ROSE, J."

This, it is contended, confines the operation of the writ to such cases as are covered by the Statute of Charles, and that, unless under that statute I have jurisdiction, I cannot interfere under any other statutory or common law jurisdiction.

At the time of this objection I was sitting in Chambers, and I said I would at once adjourn the case before myself in Court when counsel agreed that the case should be further argued as if enlarged into Court without the necessity of a formal enlargement.

If, therefore, as a Judge in Single Court I have jurisdiction at common law or otherwise to interfere, I am to exercise that power.

Mr. Aylesworth further objected, that, even in Court, I had no power to exercise any Common Law powers, as, having directed the issue of the writ under the statute, I had confined my jurisdiction.

This objection is made to prevent my interfering because Mr. Aylesworth contends that the prisoner is confined by the judgment of a Court of Record, or Court of General Sessions of the Peace: see R. S. O. Ch. 70, sec. 1.; or is "convict, or in execution under legal process:" see 31 Car. II. ch. 2, sec. 3.

Is the prisoner confined by the judgment of the Court of General Sessions of the Peace?

She was committed under a warrant (No. 1), dated 24th September, 1884, gave bail to the sessions, and was discharged from custody under the provisions of 33 Vic. ch. 27, sec. 1, D. The appeal was heard, and she was found guilty by a jury, whereupon the chairman of the Quarter Sessions endorsed on the conviction, the following: "Conviction, affirmed; and I direct the within named Esther Arscott to be punished according to the said conviction; and I further order the said Esther Arscott to pay the costs of the said appeal.

F. DAVIS, Chairman of Sessions."

In this endorsement the words of the statute are closely followed.

Sec. 1 provides that the Court of Sessions "shall if necessary issue process for enforcing the judgment of the Court."

No process was issued by the Court, but the Mayor of London East, Charles Kelly, who was the convicting magistrate, issued a new warrant, upon which the prisoner was retaken.

This it is said was done under the provisions of 32 & 33 Vic. ch. 31., sec. 70, which is as follows: "In case an appeal against any conviction or order be decided in favour of the respondents, the justice or justices who made the conviction or order, or any other justice of the peace for the same territorial division, may issue the warrant of distress, or commitment for execution of the same, as if no appeal had been brought."

It was contended by Mr. Osler that as the justice who made the conviction had, prior to appeal, issued the warrant of commitment he was *functus officio*, and the prisoner having been committed thereunder and been discharged after giving bail, it was not the Justice but the Court whose duty it was to issue the warrant of commitment after the finding of the jury of guilty and the affirmance of the conviction; but that if bail had not been given but the prisoner had remained in custody then no further order of commitment would have been necessary, or if no warrant of commitment had been issued prior to the appeal, the convicting Justice might issue the warrant as if no appeal had been brought.

I am inclined to think this is so. It may be that the power conferred upon the Court of Sessions to make such order on the appeal "as to the Court seems meet" enables it to direct punishment for the unexpired term, a portion of the term having expired before bail has been given, a difficulty the convicting Justice has struggled by various commitments to overcome in this case. I do not say how this is.

Whether Mr. Osler's contention is sound or not, I do not

find that the prisoner is in custody or confined under the judgment of the sessions, but under the warrant of the convicting Justice.

It will be observed that sec. 1, sub-sec. 3, 33 Vic. ch. 27, D., says: "Shall, if necessary, issue process for enforcing the judgment of the Court." No such process was issued. Sec. 70 of 32 & 33 Vic. ch. 31, says: " * * The Justice * * who made the conviction * * may issue the warrant of * * commitment for *execution of the same*," (i. e., of the conviction) "*as if no appeal had been brought*." And I find here a warrant of commitment for execution of the conviction, and no "process for enforcing the judgment of the Court."

I think I have power to act under R. S. O. ch. 70; and therefore power to consider and deal with this motion in Chambers.

I do not find it necessary to determine whether upon the facts of this case the prisoner is "convict or in execution under legal process," as I do not find it necessary to seek jurisdiction under the Statute of Charles.

Commitment No. 2 was quashed by my brother Galt, because it directed a term of imprisonment of six months after the second arrest, not making allowance for the term already undergone.

As I have said other warrants were issued for various reasons, but I do not stay to trace the history of the struggle on the part of the prisoner to obtain her liberty, or of the officers of the Crown to retain her in custody.

I think none of them shew a crime, and that probably none of them except the first was within the power of the convicting Justice to issue.

I cannot think that marking the writ under the statute of Charles prevents my exercising the powers conferred upon me by R. S. O. ch. 70, or that I might exercise under the common law. No case has been cited to that effect; and without authority I think I ought not to so hold.

Whatever may be the effect of the judgment of the Court of Sessions I may and ought to discharge the prisoner

from the custody under the warrants of commitment, which are, in my opinion, invalid for the reasons given.

In *Re Hespeler v. Shaw*, 16 U. C. R. 104, Robinson, C. J., delivered the judgment of the Court. He stated, at p. 105, that *certiorari* lay "where there had been a plain excess of jurisdiction, and then this remedy would be accessible even if a statute had declared that a *certiorari* should not issue, because that prohibition would not be held to apply when the Justices or sessions had entertained a matter not within their jurisdiction."

He illustrates the proposition on p. 107, when in a case as put he says: "We should not have allowed a *certiorari* in order to have it determined here whether the jury had before them sufficient evidence of the offence." And in another illustrative case says, "such a conviction, *though confirmed on appeal*, might be removed into a Superior Court by *certiorari*, in order to obtain the opinion of that Court whether any such case as we have mentioned was within the statute." He adds: "The distinction is a plain one, though it is not so clearly pointed out as we might expect it to be."

It is clear, therefore, that I might in the view I have taken, direct the conviction to be brought before me and quash it; and probably as the judgment of the Court of Sessions only confirmed the conviction, it would fall with the conviction.

The order I make is, to discharge the prisoner out of custody under the various warrants of commitment returned and filed in Court, on the return to the writ of *habeas corpus*.

The case of *McLellan v. McKinnon*, 1 O. R. 219, may be referred to as to the power of the Court of General Sessions of the Peace to alter the adjudication of punishment.

And the cases of *Re Hawkins*, 3 P. R. 239; *Re Bigger*, 10 U. C. L. J. 329; *Re Ross*, 10 U. C. L. J. 133; *Re Carmichael*, 10 U. C. L. J. 325, may be referred to as the powers of a Judge in Chambers, with reference to writs of *habeas corpus*.

Motion allowed.

[COMMON PLEAS DIVISION.]

VANDEWATERS v. HORTON.

Action, form of—Mortgage suits—Suit within competency of Division Court brought in High Court—Costs.

In selecting the form of action regard must be had not only to the interests of the plaintiff, but also to those of the defendant, and when a simple inexpensive mode of procedure is open, and a more expensive and burdensome course is adopted, it must be at the peril of costs.

The practice of bringing an action for an amount due on a mortgage within the proper competence of the Division Court in the High Court by making a claim for possession of the land, is one that must be carefully guarded; and, except in cases clearly indicating the necessity for proceeding in the High Court, no costs will be given to the plaintiff.

In this case where the amount claimed under a mortgage was within the proper competence of the Division Court, but the suit was brought in the High Court, and there were no circumstances shewing the necessity for bringing it therein, no costs were allowed the plaintiff.

THIS was an action tried before Rose, J., without a jury, at Belleville, at the Spring Assizes of 1885.

Simpson, for the plaintiff.

Burdett, for the defendant.

The learned Judge delivered the following judgment in which the facts are fully stated.

May 4, 1885. ROSE, J.—The sole question is, whether the sum of \$71 should be applied on the mortgage debt.

The facts are as follows: The plaintiff is assignee of the mortgage in question. The mortgage was made to one Jones, brother-in-law of the defendant Jane Horton. The mortgage debt was \$460. The mortgagee held also a chattel mortgage as collateral. He sold the chattels and credited the proceeds on the mortgage in question leaving a balance of \$129.

Jane Horton's father-in-law had transferred to her husband a note made by Jones, on which there was apparently a balance due of \$71. This note was payable to bearer, and Jane Horton became the bearer.

The land mortgaged belonged to Jane Horton.

She and Jones came to Mr. Skinner's office to have the interest calculated on the note, Jones having agreed to credit the amount on the mortgage debt. There is a conflict of testimony as to what balance was then found due on the note. It was either \$71 or \$32. Jane Horton says \$71. Jones says \$32. Even if the smaller sum, Jones should have credited it on the mortgage debt, which would have left the balance under \$100. Instead of doing so he assigned the mortgage to the plaintiff, giving him a covenant of indemnity, and this action was brought.

I treat Jones as the real plaintiff. He is a man of substance, and if the plaintiff has in fact paid him the consideration sum mentioned in the assignment Jones will have to repay it and bear the costs of this action, so far at least as is necessary to protect the plaintiff. The mortgage was over due when assigned.

Jones sought at the trial to set off against the note moneys sufficient to equal the balance due. I found against his contention, and that there were in fact \$32 still due on the note. I was led to this conclusion by the evidence of the elder Horton.

I am of the opinion that Jones knew of Jane Horton's contention, that there was a further credit to be given on the mortgage, and that the assignment of the mortgage was made to prevent this credit being obtained.

I find as a fact that the balance remaining due on the note at the time of the meeting at Mr. Skinner's office, was appropriated by Jane Horton to the payment of the mortgage debt, and that Jones then and there agreed to such appropriation, and promised to endorse a receipt upon the mortgage.

The real question in dispute could have been settled in the Division Court.

Jane Horton appeared to be a woman beset by difficulties. Her husband was admittedly a ne'er-do-well. She was straining every nerve to maintain her family. Her husband's unfortunate habits had led to the dissipation of much of her little property, and for some months

prior to the action he had been in Michigan with the avowed purpose of earning money. It did not appear that his earnings found their way to his family.

Under such circumstances it seems hard that her brother-in-law should take harsh proceedings against her to take away the remainder of her property. That he had ill-feeling against her, as was suggested by some of the evidence, even if for cause, which did not appear, afforded no excuse—rather the contrary.

I cannot think that there was such need of expedition that it would have been impossible to have tried the question in dispute at the Division Court; nor do I think this form of action was at all necessary to protect the plaintiff's or Jones's interests.

It would seem a not too severe code to establish, that in selecting the form of action regard must be had not only to the interests of the plaintiff but also to those of the defendant. Where a simple inexpensive mode of procedure is open, and a more expensive and burdensome course is adopted, it must be at the peril of costs.

I regretted to learn from Mr. Northrop, the experienced Master of the Court at Belleville, that since the coming into force of the Judicature Act there was an increase in number of what were really actions on the covenant of the proper competency of the Division Courts, but the High Court jurisdiction is invoked by making a claim for possession of the land. This is a practice that must be carefully guarded, and no doubt, except in cases clearly indicating the necessity for proceeding in the High Court, no costs will be given to the plaintiff.

From what appeared before me at the trial I am convinced that if I awarded costs against the defendant I would be decreeing her financial ruin. I am glad to find some principle of decision to enable me to avoid such result. Possibly in days to come when more kindly feelings may have displaced the present enmity, even the mortgagee may not regret this decision.

The judgment will be for plaintiff for \$32, without costs. \$32 are somewhat too much as the sum paid into Court was more than was admitted, but a computation of interest on each amount of debit and credit would bring the balance to about \$32.

Counsel for defendant stated his willingness and readiness to pay the amount found due at once. On payment within thirty days no judgment is to be signed.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

ILER V. ILER.

Board and lodging—Relatives—Implied contract to pay for—Necessity of evidence of express contract.

Where brothers, or sisters, or other near relatives, live together as a family, no promise arises by implication to pay for the services rendered or benefits which as between strangers would afford evidence of such a promise; and therefore in an action between relatives so living together for board, wages, or the like, an express promise must be proved by the party making the claim.

Redmond v. Redmond, 27 U. C. R. 220, followed and approved of.

THE plaintiff's claim was on two promissory notes; one, with interest, amounting to \$969.66; and the other to \$184; and also for certain sums of money amounting to \$184.64, lent to the defendant.

The plaintiff also claimed for a team of horses, and some cows and sheep, to which he was entitled under his father's will.

The defendant counter-claimed for board and lodging of the plaintiff.

The cause was tried before Cameron, C. J., without a jury, at Chatham, at the Spring Assizes of 1885.

The learned Chief Justice decided in favour of the plaintiff for the amount of the notes and money lent, but against the plaintiff's claim for the team of horses, and the cows and sheep, on the ground that the defendant had furnished the horses, and that the plaintiff had abandoned his claim to the cows and sheep. He also disallowed the defendant's claim under his counter-claim for the board and lodging.

The learned Judge directed judgment to be entered in favour of the plaintiff for \$1,149.30, the amount of the claim on the promissory notes and money lent.

In Easter Sittings, *Aylesworth* moved on notice to set aside the disallowance of the amount of the defendant's counter-claim for the board and lodging, and to enter a verdict for defendant therefor.

During the same sittings, June 2, 1885, *Aylesworth* supported the motion.

Pegley (of Chatham), contra.

The arguments and cases cited sufficiently appear in the judgment.

June 27, 1885. GALT, J.—The plaintiff has not moved. I have read the evidence, and agree with the learned Chief Justice there was no evidence that the plaintiff agreed to pay the defendant for his board. Moreover, for the greater portion of the time, the house in which the plaintiff lived was the house of his mother and not of the defendant.

The case of *Redmond v. Redmond*, 27 U. C. R. 220, cited by Mr. Aylesworth, appears to me to be adverse to the counter-claim, as also the conversation between the defendant's wife and the plaintiff, when he brought in an armful of wood for the stove. I do not think much stress can be laid on the expression alleged to have been made when he was desirous of selling one of the notes, viz.: that he did not wish to sue the notes himself, as his brother might bring a claim against him for board, for he must have known

that if his brother was entitled to such a claim he could enforce it, whether the note was sued by the plaintiff or by his transferee.

The motion must be dismissed, with costs.

ROSE, J.—As I understand the effect of the decision in *Redmond v. Redmond*, 27 U. C. R. 220, it is, that where brothers or sisters, or near relatives, live together as a family, no promise arises by implication to pay for services rendered, or benefits conferred, which as between strangers would afford evidence of such a promise; and so in an action between relatives so living together, for board or wages, or the like, an express promise or agreement must be proved by the party urging the claim.

In the present case, prior to their father's death, which took place in 1876, the parties to this action were with other brothers living at home in the ordinary way, save that the defendant had had committed to him the charge of affairs upon an understanding that at his father's death he was to have the homestead, farm, and other benefits under the will. During this time it is probable he had opportunities to accumulate money for his own benefit.

By the will that part of the homestead farm described in the will, was given to the defendant charged with certain burdens, and to his mother was given for life a portion of the farm on which was the dwelling house, stables, and orchard. The defendant was required to provide for her during her life, "all that she may require; also the use of farm cows, should she wish it; and also all the poultry on the place for her own use;" also all the household furniture.

After the death of the father the family, then at home remained with the mother, and they all lived in common.

The plaintiff lived with his mother, as also did the defendant, eating at the same table until December, 1882, when owing to some family disagreement the defendant, who had married and brought his wife home on the 24th May, 1881, had his table set in the kitchen, the mother

remaining in the dining room. The plaintiff took his meals at his brother's table.

In July, 1884, the defendant having erected a house for himself moved into it, the plaintiff remaining with the mother. This action was brought in October, 1884.

While thus living together the defendant borrowed money from the plaintiff from time to time, agreeing to pay him interest at the rate of 10 per cent.

The plaintiff denies any promise to pay board, and asserts that his brother expressly stated in answer to a question as to a rumour that he intended making such a claim, that he never had such an intention.

The defendant says that on the 28th of April, 1880, the date of one of the notes sued upon, he told the plaintiff that he had boarded him a long time for nothing, and he thought it was no more than right that he should allow something for board, and that the plaintiff said when they settled he would make it all right. This is denied by the plaintiff.

One Elihu Scratch said that the plaintiff tried to sell him one of the notes in question, and gave as a reason that, "if he sued, the defendant would put in a set off for board, which he would have to pay;" and the defendant's wife stated that on one occasion, in a conversation in which plaintiff asked her for ten cents for bringing in some wood, she asked him who got his meals, and he replied, "they are to be paid for on some notes I hold against Adam."

The defendant also stated that when he moved to his new house, he asked the plaintiff if he would go with him or remain with his mother, and that he replied that it would not cost defendant any more to board him with their mother than in his own house, and that he would stay with their mother.

On these facts Mr. Aylesworth urged strongly that the defendant's statement of a promise to pay board since 1880, was so corroborated as to be entitled to prevail. I was much impressed with that view on the argument, and feel its force as yet.

I am, however, met with this difficulty. The learned Chief Justice at the trial accepted the plaintiff's denial, doubted the statement of Scratch, and thought the conversation with Mrs. Iler was not a serious one, and my Brother Galt agrees with him. Moreover it is clear that the house, furniture, and part of the provisions, were the mother's; and that all that the defendant can say is, that his mother obtained from him supplies to a greater extent than she needed for her own support and was entitled to under the will. It will be remembered that the words of the will are: "All that she may require;" and it would hardly be contended that this was to be merely what she might need for her own physical support, allowing nothing for friends whom she might desire to entertain. The defendant, it seems to me, if entitled to anything, would only be entitled to so much extra food as was supplied to the mother for his brother's use, and not to the usual rate for board, which includes house-rent, fuel, light, care, food, &c.

Then again, until the defendant left home he was receiving from his mother the use of the house, &c., to which he was not entitled, and it may well be that she was entitled to such extra allowance as would be some return for such benefits, so that as between the mother and the defendant, until he left home, it might be impossible for the defendant to shew that he had given more than he had received. If she was content to have the plaintiff reap some advantage from this arrangement it lies not in the defendant's power to claim it again from his brother.

Moreover, the fact that from time to time he borrowed money from the plaintiff at a high rate of interest, and had no allowance made for the board, cannot be overlooked.

There was but a short period of time between the moving into the new house and the bringing of this action—about three months.

The evidence does not enable me to come to any conclusion so strongly in the defendant's favour as to warrant my dissenting from the view of the learned Chief Justice,

concurred in by my Brother Galt. I therefore agree that the motion must be dismissed, with costs.

CAMERON, C. J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

THE BANK OF MONTREAL V. DAVIS ET AL.

Voluntary conveyance—Fraud—Intent to delay creditors—Evidence of—Subsequent creditor.

In 1878 J. D., carrying on business as a wool merchant, arranged with his two sons, H. D. and T. D., to convey to H. D. two parcels of land which H. D. was to hold until T. D. came of age. H. D. held the land until 1882, when he conveyed it to his father, who immediately reconveyed one parcel to H. D., and the other to T. D. It was found that the conveyances of 1882 were merely to carry out the trust upon which the conveyance of 1878 was made: that when it was made J. D. was in a position to pay all his debts in full, even after deducting the property in question; and that no debt in existence when the conveyance of 1878 was made was now unpaid, except a sum of \$1,000 due to the wife for rent, which was secured by mortgage, but it appeared she joined in the conveyance, and therefore it was not available to the plaintiffs for the purpose of setting the conveyance aside.

Held, that the conveyances to H. D. and T. D. were valid, for that under the circumstances they could not be deemed to be made with intent to hinder, delay, or defraud creditors.

THIS was an action to set aside conveyances of land to the two sons of John Davis, viz., the defendants Thomas E. Davis and Harry H. Davis, as being fraudulent and void as against creditors.

The cause was tried before Armour, J., without a jury, at Hamilton, at the Spring Assizes of 1885.

The facts so far as material are set out in the judgment of this Court.

The learned Judge at the trial delivered the following judgment :

ARMOUR, J.—This case must be determined by the view to be taken of the conveyance of the 2nd of January, 1878, for the conveyances of the 20th February, 1882, were merely the carrying into execution the trust upon which the conveyance of the 2nd January, 1878 was made; and as to this conveyance I have come to the conclusion that although voluntary it was not made with any intent to delay, hinder, defeat, or defraud creditors.

I find that at the time it was made the grantor was in solvent circumstances: that he owed no debt at the time of making it which is unpaid now, unless it be the \$1000 owed to his wife for rent; and assuming this to be a debt and such an one as was recoverable against the grantor, and that it was proved as against the defendant Thomas to be such a debt, it never was a debt enforceable against the property in question by the creditors, because she was a party to the conveyance and is consequently not available to the plaintiffs for the purpose of setting aside the said conveyance.

I have only to add that the evidence of the Davis family was in my opinion truthful, and that they honestly intended to tell the exact truth about the impeached transactions.

Judgment for defendants.

During Easter sittings *A. Bruce* (of Hamilton) moved on notice to set aside the judgment entered for the defendants, and to enter judgment for the plaintiffs.

During the same sittings, May 29, 1885, *Bruce* supported the motion, and referred to *Mackay v. Douglas*, L. R. 14 Eq. 106; *Ex p. Russell, Re Butterworth*, 19 Ch. D. 588; *Ware v. Gardner* L. R. 7 Eq. 317; *Re Ridler*, 22 Ch. D. 74; *Irwin v. Freeman*, 13 Gr. 465; *Cameron v. Kerr*, 3 A. R. 30.

Robertson, Q.C., contra, referred to *May on Fraudulent and Voluntary Conveyances*, p. 50: *Masuret v. Mitchell* 26 Gr. 435.

June 27, 1885. ROSE, J.—It will be observed from the judgment of the learned Judge at the trial, that he has given full credit to the witnesses from whom the facts must be learned.

Without his opinion I should have had some difficulty in coming to so clear a conclusion, some of the evidence, as it appears in the reporter's notes, in my opinion, giving counsel ground for observation.

In *Hobbs v. Scott*, 23 U. C. R. 621, Draper, C. J., forcibly states the difficulties of deriving a correct impression from the reading of evidence.

In this case we have what was lacking in *Hobbs v. Scott*, viz, question and answer. But we all know that the most careful reporter sometimes finds it impossible to note the exact language of the witnesses. So much depends upon the manner of the counsel, whether quiet, humorous, or irritating; the tone of voice of the witness; the expression of countenance; the manner, whether prompt or hesitating, shrewd or simple, thoughtful or careless, that where a Judge of the experience and ability of the learned Judge before whom this case was heard, sends us so strong an expression of opinion, I do not feel warranted in refusing to act upon it without much stronger reasons than present themselves here.

Taking the evidence of the Davis family, it appears that in January, 1878, the father, John Davis, then being in the wool business in Hamilton in partnership with one Burkholder, arranged with his sons, the present defendants, to convey to the defendant Harry H. Davis, two parcels of land adjoining the homestead near Hamilton, containing in all about one $\frac{3}{4}$ acre of land, and which the parties then estimated to be worth about \$2,000. Harry was then nearly of age, and his brother Thomas about two years younger. Harry was to hold the land until Thomas came of age. To secure this Harry gave his father a note for \$1,000, dated 2nd January, 1878, payable one year after date to the father's order.

This land was held by Harry until February, 1882, when he reconveyed both lots to his father who at once conveyed the one back again to Harry and the other to Thomas.

The transaction was purely voluntary. The plaintiffs contended it was fraudulent and void.

Before examining the facts it will be convenient to find the rule governing the decisions of such cases.

In the oft-cited case of *Freeman v. Pope*, L. R. 5 Ch. 538, Lord Hatherley, L. C., said, at p. 540: "It would never be left to a special jury to find, *simpliciter*, whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the Judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so." See also *Mills v. Kerr*, 7 A. 2. 769.

Lord Hatherley continues, at p. 541: "But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, *an amount without which the debts cannot be paid* then, since it is the *necessary consequence* of the settlement (supposing it effectual) *that some creditors must remain unpaid*, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute."

Sir G. M. Giffard, L. J., says, at p. 545: "Where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, *if after deducting the property*, which is the subject of the voluntary settlement, sufficient *available* assets are not left for the payment of the settlor's debts, then the law infers intent. * * Again, if *at the date* of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them."

Giving credit to the witnesses, the finding of the learned Judge that the deeds of 1882 were merely the carrying into execution of the trust upon which the conveyance of the 2nd of January, 1878, was made, cannot be successfully impeached.

Then, in the language of Lord Justice Giffard, (1) was John Davis, in January, 1878, in a position actually to pay his creditors; (2) After deducting the land so settled were sufficient available assets left for the payment of his debts? or, in the language of the Lord Chancellor: (3) Did the settlement subtract from the property which was the proper fund for the payment of those debts, an amount without which the debts could not be paid? or (4) Was the *necessary effect* of the settlement to defeat, hinder, or delay the creditors?

The plaintiffs are at once met with the difficulty that except as to the \$1000, the debts then existing have all been paid.

At that date John Davis was, as I have said, in business. What his exact position as to the assets and liabilities of that business was does not appear; but when he dissolved in December, 1878, after clearing up all liabilities and making allowance for all bad and doubtful debts, he had a surplus of over \$2,000—nearly \$2,400—including Burkholder's small interest, which he assigned to Davis. Assume his position to have been about the same in the preceding January. Then, according to the plaintiffs' valuation of his property, he would then stand about as follows, assuming he had then purchased the store from his wife, which is not very clear:

Dwelling house, value	\$7,500
Store	4,500
Lots in question, say	2,000
Furniture (house) value	1,000
" (office) "	150
Interest in business, surplus say	2,250
	<hr/>
	\$17,400

Liabilities—

Mortgage to wife on dwelling house property	\$7,500
First mortgage on store.....	2,800
	<hr/> \$10,300
Surplus	7,100
Deduct the two lots in question	2,000
	<hr/>
Surplus	\$5,100

In the \$7,500 mortgage was embraced a sum of \$1,000 for rent of the store while owned by the wife and occupied by the firm.

The defendants contend that the dwelling house should be valued at	\$8,857
The store.....	6,500
	<hr/>
	\$15,367
Instead of at	12,000
	<hr/>
as estimated by plaintiff. If so..	\$3,367
would be added to the	7,100
	<hr/>
making the surplus.....	\$10,467

There was evidence to support this contention.

On this evidence, apart from the finding of the learned Judge at the trial, I am unable to find (1) that in January, 1878, John Davis was not in a position actually to pay his debts; (2) that after deducting the land so settled there were not sufficient available assets left for the payment of his debts; (3) that the settlement subtracted from the property, which was the proper fund for the payment of the debts, an amount without which the debts could not be paid, nor is there any evidence to shew (4) that the necessary effect of the settlement was to hinder or delay the creditors.

Certainly there is no evidence to warrant a reversal of the judgment of the learned Judge on that point.

Unless the real estate on which the mortgage to the wife was given is not sufficient to satisfy the debt, she, the mortgagee, cannot be a creditor as to such debt, for a mort-

gagee will be a creditor only for the balance. See *Masuret v. Mitchell*, 26 Gr. 435.

Here, even according to the plaintiffs' contention, the partnership property is worth the mortgage debt; and according to the defendants' contention there is a surplus of nearly \$1,400.

It was not contended that the interest which accrued subsequently and remains unpaid, can be added to the mortgage debt to reduce the security and create a surplus or rather a deficiency.

No such question can arise as to the \$2,800 mortgage on the store.

The necessity on this line of attack of shewing an indebtedness existing at the date of the conveyance in January, 1878, was admitted, as also the effectiveness of the answer that such indebtedness had been paid subsequent to that date and prior to the suit.

Irwin v. Freeman, 13 Gr. 465, was referred to. See particularly p. 470.

The plaintiffs accordingly laboured to shew that John Davis was then liable to the bank on paper of Barber Bros. as endorser, and that such liability still continued at the date of commencing this suit.

I think it sufficiently appeared that all indebtedness then existing to the bank was paid long prior to that date.

The case of *Cameron v. Kerr*, 3 A. R. 30, was cited, but it seems to me essentially different. There Moffatt & Co. had a line of credit with the bank, and wishing to extend it obtained an extension giving a mortgage on the homestead of Lewis Moffatt, K. M. Moffatt, a retiring partner joining in the covenants. It was contended that by subsequent discounts all the paper existing at the date of the mortgage had been paid off, and K. M. Moffatt discharged from his covenant to pay.

The Court held that the real transaction was, that the bank was to advance from time to time moneys as required up to the agreed amount on the security of customers' paper, and the mortgage was collateral to secure the

balance, and that the replacing of paper with fresh paper from time to time did not in any sense pay the indebtedness to the bank unless the general balance were reduced.

In this case Barber Bros. were customers, a house with a high financial reputation, whose paper was discounted by John Davis and retired by Barber Bros. as it came due until they failed some time in 1884, and in failing brought down Davis with them. There was a liability of Davis to the bank on each note, and that liability ceased as such note was paid. If any note had been in existence in January, 1878, and kept renewed from time to time to date of action, the plaintiffs' contention would have been well founded. Such is not the evidence. It is quite to the contrary.

It was argued by Mr. Robertson that the financial position of Barber Bros. in 1878 was so strong as to make pertinent the observations of Lord Selborne, L. C., in the Court of Appeal, in *Re Ridler*, 22 Ch. D. 76, at p. 79, as follows: "Where the prospect that the person subject to the liability will be called upon is so remote that it would not enter into any one's calculations, I do not say that the existence of the contingent liability would make a settlement bad." The liability was on shares in the Glasgow Bank when everybody believed it good; and again on p. 80, see similar language.

There was no attempt, however, to make this point in the evidence.

The plaintiffs further contend that the deeds were fraudulent and void, on the ground that Davis was engaged in business and could not take a part of his property and make a voluntary gift of the same, especially when the business was risky.

As I understand the argument it is sought to put the defendants in the same position as if at the date of the conveyance their father was about entering into business.

In *Ex p. Russell, Re Butterworth*, 19 Ch. D. 588, in the Court of Appeal, Jessel, M. R., says, at p. 598: "The principle of *Mackay v. Douglas*, L. R. 14 Eq. 106, and that line of

cases, is this, that a man is not entitled to go into a hazardous business, and immediately before doing so settle *all* his property voluntarily, the object being this: 'If I succeed in business, I make a fortune for myself; if I fail, I leave my creditors unpaid. They will bear the loss.' That is the very thing which the statute of Elizabeth was meant to prevent. The object of the settlor was to put his property out of the reach of his future creditors. He contemplated engaging in this new trade and he wanted to preserve his property from future creditors. That cannot be done by a voluntary settlement. That is, to my mind, a clear and satisfactory principle."

In this case there is not a word of evidence to suggest that the object of John Davis was to protect from his creditors the property so conveyed. It was suggested by the plaintiffs that the conveyance was made to enable his son Harry to vote. The Davis family state positively that it was merely to give each of the boys a lot of land as they came of age. They were both at home, living and working with the father. It was further suggested it was to save a will, and the plaintiffs argued that the taking of the note back was evidence that the father intended to control the property during his life time. But whatever was the motive it is clear to my mind there was no intent to protect against creditors.

Again it was not "all" his property, nor, according to the father's view, was it a very large portion of the surplus after providing for payment of all liabilities.

The business was not a peculiarly risky one. H. Davis said it was speculative. So also is wheat and many other similar lines of trade.

I have endeavoured to point out above my reasons for saying it was not the necessary effect of the conveyance to defeat creditors.

Nor does it seem to me that this is of the class of cases aimed at by *Ex p. Russell, Re Butterworth*, 19 Ch. D. 588, and the like cases. There was no change in the business in contemplation, no increased financial responsibilities; and

to hold that a man in business could not settle a small portion of his estate, provided he paid all existing debts before suit brought to enforce the claim of the attacking creditor, would be going much farther than any case to which we have been referred.

Lindley, L. J., in *Ex p. Russell, Re Butterworth*, Ch. D. 588, at p. 601, asks what the settlement there was for, and answers: "Obviously, not simply to benefit his wife and children, but to secure and protect them against the unknown risks of the new adventure." In the preceding sentence he points out that the settlement was substantially of "the *whole* of his property upon his wife and children."

I think the motion fails, and must be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

DYMENT V. THOMPSON.

Sale of goods—Place of inspection—Acceptance of part—Delivery by car loads—Right to reject residue as not answering contract—Mitigation of damages—Cross-action.

The plaintiff, a lumber dealer and mill owner agreed with the defendant, who carried on a lumber business at Hamilton, to supply him with certain grades of lumber, to be shipped on board of cars at the stations nearest to the plaintiff's mills, and to be sent to the defendant at Hamilton; payment to be made by acceptance at three months from delivery. The lumber was shipped in car loads to the defendant from time to time, some of which were accepted and others rejected by him.

Held, that the defendant had the right of inspection at Hamilton, but having accepted certain of the car loads, he had no right to reject the others, because composed of lumber part of which did not answer the contract, unless such part was so inferior in quality and to such an amount as to destroy the distinctive character of the loads, which was not the case here, for out of the whole quantity delivered only four-and-a-half per cent was agreed to be defective; and that defendant must rely upon his action for damages, or give the inferiority in answer *pro tanto* to the claim.

ACTION for the price of a quantity of lumber.

The defence was, that certain deliveries of the lumber were inferior in quality, and on that account had been properly rejected by the defendant.

The case was tried before Galt, J., and a jury, at Barrie, at the Spring Assizes of 1885.

It appeared that after the plaintiff had given evidence in support of his claim and had closed his case, and the defence had been gone into, and on the examination in chief of the defendant, on his counsel going into the question of the lumber on its arrival at Hamilton not being in accordance with the contract, the plaintiffs counsel objected that no such evidence could be given as a defence, because the defendant had accepted the lumber by not inspecting and exercising his right of rejection at the points of shipment, and was left to his action for damages, or could give evidence only as to the inferiority in reduction of damages.

The defendant's counsel contended that the defendant had the right to inspect and reject the lumber on its arrival at Hamilton, and that the loading of the lumber on board the cars by the plaintiff was not an acceptance of the lumber by the defendant.

The learned Judge ruled in favour of the plaintiff; and after some discussion the case proceeded. The defendant refused to counter-claim, but gave evidence of inferiority in reduction of damages.

A verdict by consent was entered for the plaintiff for \$1,325, without prejudice to his right to move in the Divisional Court as he might be advised.

During Easter Sittings, *Lount*, Q. C., obtained an order *nisi* to set aside the verdict and judgment for the plaintiff, and to enter judgment for the defendant; or for a new trial.

During the same sittings, June 2, 1885, *Lount*, Q. C. and *Kapelle*, supported the order *nisi*. The property never passed to the defendant, and therefore he is not liable; but even if it did pass there was, under the circumstances, a right of rejection. This was not the purchase of a specific article, but of something not in existence, and the intention was that the defendant was to have an opportunity to inspect before accepting the article, and if not according to contract he might reject it. The time for inspection was when the goods arrived at Hamilton. The defendant could not be expected to have persons at the different places of shipment. In fact no opportunity to inspect was afforded to the defendant, as he was never notified of the time and place of shipment. The goods were shipped in car loads and inspected on their arrival at Hamilton, and the defendant, as he had the right to do, rejected the car loads which did not answer the contract. They referred to *Benjamin on Sales*, 4th Amer. ed., secs. 1348-9; *Lucy v. Mouflet*, 5 H. & N. 229; *Grimoldbi v. Wells*, L. R. 10 C. P. 391, 394-5; *Hedstrom v. Toronto Car Wheel Co.*, 8 A. R. 627; *McClure v. Kreuteziger*, 6 O.

R. 480; *Wait v. Baker*, 2 Ex. 1, 7; *Street v. Blay*, 2 B. & Ad. 456, 463; *Bowes v. Shand*, 2 App. Cas. 455, 480.

McCarthy, Q. C., and *Pepler* (of Barrie), contra. There does not seem to be any question as to the law. The only question is, as to the application of it. It is quite clear that the purchase being of an unascertained chattel the property did not pass until an opportunity was afforded for inspection. The inspection was to take place at the place of shipment, and the vendor was constituted the vendee's agent to make an appropriation of the goods and deliver the same to the carriers. On the goods being set apart and loaded on the cars the property passed to the vendee. The only exception is, where goods are sold subject to a condition, and the condition has not been performed. So long as the vendee got the article contracted for, *i.e.*, so long as the goods answered the particular description of lumber contracted for, there could be no rejection. The cases in which rejection has been allowed is where the character is essentially different; for instance, where beans had been delivered instead of peas. The defendant's remedy must be by cross action or counter-claim for breach of warranty. All mercantile contracts are founded on what is reasonable. It would be most unreasonable to ask the plaintiff to take back the whole of the lumber supplied because a small quantity is found to be defective. It is certainly more reasonable to compel the defendant to take the lumber and to bring his cross action for the part defective. The defendant, however, did not raise this question at the trial, but merely set up that there was a breach of warranty, and the sum of \$90 was agreed on as damages to be allowed on that basis. Moreover, the defendant by accepting a part of the lumber contracted for, cannot reject the residue. They referred to *Browne v. Hare*, 3 H. & N. 484, 4 H. & N. 822; *Benjamin on Sales*, 3rd. ed., pp. 302, 5, 315; and 4th Amer. ed., sec. 564; *Fraguno v. Long*, 4 B. & C. 219; *Chanter v. Hopkins*, 4 M & W. 399; *Kirkpatrick v. Gowan*, 9 Ir. C. L. R. 521; *Nichol v. Godts*, 10 Ex. 191; *Allan v. Lake*, 18 Q. B. 560; *Wieler v.*

Schilizzi 17 C. B. 619; *Bannerman v. White*, 10 C. B. N. S. 844; *Behn v. Burness*, 3 B. & S. 751; *Couston v. Chapman*, L. R. 2 H. L. Sc. 250; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Azèmar v. Casella*, L. R. 2 C. P. 677; *Dawson v. Collis*, 10 C. B. 523; *Howland v. Brown*, 13 U. C. R. 199; *George v. Glass*, 14 U. C. R. 514; *Marshall v. Jamieson*, 42 U. C. R. 115.

Lount, Q. C., in reply. The evidence shews that the lumber did not answer the description contracted for. There can be no appropriation unless the goods answered the contract; and where there is a right of rejection there must be a reasonable notice to inspect. As to acceptance of part, this only applies when the acceptance is of part of a larger quantity all delivered at the same time; but not where the delivery takes place by separate shipments: *Benjamin on Sales*, 4th Am. ed., secs. 181, 887, 894.

June 27, 1885. ROSE, J.—This is a motion to set aside the judgment herein for the plaintiff, and to enter judgment for the defendant; or for a new trial, on various grounds.

The plaintiff resided at Barrie, and had at least three saw mills on the line of the railway, one at Gravenhurst, and the other two in North Simcoe. The defendant resided in Hamilton, where he carried on the lumber business.

The parties had dealings in the year 1883; and in January, 1884, the plaintiff opened negotiations for a new contract, which resulted in certain correspondence. This correspondence referred to the previous year's transactions, and by reference thereto provided that the lumber was to be shipped to Hamilton to defendant's order from the stations convenient to the plaintiff's mills, the defendant paying the freight. At least I assume it was by such reference, as the parties seem to have taken it for granted that such terms were in the contract, although they do not expressly appear in the correspondence.

Some deliveries were made and were accepted, but certain car loads were rejected after they had arrived in Hamilton.

When Mr. Lount, at the trial, commenced the examination of his client in defence to shew that the lumber rejected at Hamilton was not in accordance with the contract, Mr. McCarthy objected to any evidence of quality being given except in reduction of damages, contending that the defendant should have inspected the lumber as delivered on board of the cars at the mills, and exercised his right of rejection there, and that not having done so he could not inspect and reject it at Hamilton, but was left to his action for damages, or to give evidence of inferiority in reduction of damages.

The learned Judge gave effect to the objection; and the evidence was then given as to inferiority.

After much evidence had been given, in order to save time and further expense, the parties agreed that the claim should be reduced by about \$90, and judgment was accordingly given for the plaintiff for the balance, the defendant having reserved to him all rights of motion, notwithstanding his assent to the amount of the judgment in case the plaintiff's contention should be held to have been well taken.

The next point, then, to be determined is, whether the defendant was bound to inspect and reject at the stations where the lumber was shipped, or could do so at Hamilton. If he had the right to inspect and reject at Hamilton, then the case must go back for a new trial to enable the jury to say whether the defects or inferiority, which were measured by \$90, were such as caused the lumber to lose its "distinctive character," as in *Wieler v. Schilizzi*, 17 C. B. 619.

If there was the right to inspect at Hamilton, so as to cull out what was not in accordance with the contract, but no right to reject the quantity which answered the contract, then I think, for the reasons as hereinafter stated, it will not be necessary to send the case down again to a jury.

I think we must take it for granted that the agreement between the parties was, that the plaintiff was to deliver on board cars at the station near the mill, and that the defendant was to pay the freight, as the case was argued before us as if such was the agreement, although, as I have said, there is nothing in the writings to indicate it.

The case may then be stated thus: the plaintiff a lumber dealer and mill owner agrees with the defendant to supply him with certain grades of lumber to be shipped on board cars at the stations nearest the plaintiff's mill, and to be sent to the defendant at Hamilton, payment by acceptance at three months from delivery.

It would seem clear on the evidence that the plaintiff might ship from any or all of his mills as his yard supply gave him the lumber required to fill the contract. The sale was therefore not of a specific chattel, but the vendor was at liberty to set apart any lumber in his yard that would answer the contract, and load the same on board the cars.

Mr. McCarthy contended that the property passed to the defendant immediately upon the lumber being loaded on the cars, and that, as there was an opportunity for inspection prior to loading, the defendant could not thereafter exercise it.

I do not see, on the evidence, that any notice was given to the defendant of appropriation by the plaintiff of any specific lumber prior to shipment, or any notice to the defendant of the mill from which each or any shipment was to be made, or the day of shipment.

The law as to the passing of property is fully stated by Parke, B., in *Wait v. Baker*, 2 Ex. 1. He says at p. 7: "It may be admitted, that if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee;

and if there is a binding contract between the vendor and vendee, either by note in writing, or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier." He adds this most important clause: "It is necessary, of course, that the goods should agree with the contract."

This seems to me to leave quite open the question as to the place of inspection, because, assuming that the goods do not agree with the contract, then, even on all the above facts concurring, the property will not pass.

I have gone through all the cases cited, and such others as I could find, to discover, if possible, some distinct authority on the question as to place of inspection on facts similar to those we are considering. It seems to me the case, cited by Mr. Lount, of *Grimoldbi v. Wells*, L. R. 10 C. P. 391, lays down the proper rule for our guidance.

In that case the goods (tares) were purchased by the defendant from the plaintiff. They lived about nine miles apart. The goods were being sent by the plaintiff to the defendant in a cart. While on the way they were met by a cart sent by the defendant and transhipped. The defendant had them taken to his barn where they were inspected and rejected. The main question decided in the suit was that the defendant might reject them by giving notice to the vendor, and was not bound to send or offer to send them back, or to place them in neutral custody.

Brett, J., said, at p. 394: "There is here a contract for the sale of goods and by agreement they are to be delivered before a fair opportunity for inspection arises; for it cannot properly be said that it would be reasonable to hold the defendant bound to examine them when they were delivered to him at half way of the journey."

The doctrine laid down by Brett, J., seems to be that there must be a fair opportunity to inspect under such circumstances as would make it reasonable to require the vendee to inspect.

It seems to me on the facts of this case it would not be reasonable to hold that the defendant should have in-

spected each car load as the lumber was shipped ; and, if it had been so desired, the contract should have expressly provided for such inspection before the lumber left the yard. It is within my knowledge that many mill owners in Ontario during the past thirteen or fourteen years have expressly provided by contract for inspection in the yard before shipment, so as to guard against such a difficulty as has here arisen.

It was, however, further contended that, admitting the right to inspect at Hamilton, yet, as some of the cars had been accepted, therefore the right of rejection of other cars was taken away.

It was not argued that if there was a right of inspection at Hamilton the defendant was bound to accept so much as clearly did not answer the contract.

It appears that the defendant accepted the first and second carloads sent respectively on the 2nd of May and the 4th of June ; rejected fourteen carloads sent respectively on the 16th, 17th, 19th, 20th, and 21st of June, and the 12th, 14th, and 15th of July, and the 1st, 19th, and 22nd of August ; and accepted intermediate shipments of seven carloads sent on the 17th and 20th of June, 17th and 18th of July ; thus on the same day accepting some cars and rejecting others.

The contract, so far as it appears in writing, fixes no dates for shipment. It seems to have been agreed that the shipments were to be made as ordered by the defendant during the season.

On the 8th of July the plaintiff wrote to the defendant :

"I have your letters ordering me to ship it as fast as possible, and I cannot hold it all back at mill, so I shall ship some more of it at once."

I have examined the cases of *Hoare v Rennie*, 5 H. & N. 19 ; the subsequent case of *Simpson v Crippin*, L. R. 8 Q. B. 14, where the Court declined to follow *Hoare v. Rennie* ; *Jonassohn v. Young*, 4 B. & S. 296 ; *Heilbutt v. Hickson*, L. R. 7 C. P. 438 ; *Roper v. Johnson*, L. R. 8 C. P. 167 ; *Brandt v. Lawrence*, 1 Q. B. D. 344 ; *Mid-*

land R. W. Co. v. Ontario Rolling Mills Co., 2 O. R. 1, 10 A. R. 677, and other cases, and have found no case going the length of saying that where there is a purchase of chattels to be delivered from time to time, either on named or unnamed dates, the vendee can, as here accept certain deliveries and reject others, because the rejected deliveries have mixed up with them a small quantity of the article purchased inferior in quality.

It seems to me that the result of the decisions is, that where the article purchased is to be delivered in parcels from time to time, and where the purchaser accepts a portion he has no right to rescind the contract because another portion delivered is made up in part of the article contracted for, which answers the contract, and in part of which does not answer the contract. He must rely upon his action for damages, or give the inferiority in answer *pro tanto* to the claim.

To illustrate : when the defendant accepted the first and second car loads, I am of the opinion that he had no right to reject the third, unless it was composed of material so inferior and to such an amount as destroyed the distinctive character of the load. For example, if nine-tenths of the load were rotten culls, I do not think he would be obliged to accept the load ; nor on the other hand if one piece which would be classed as a cull were with the load, could he reject the whole load.

Of course he had, as I have before said, the right to inspect at Hamilton, and I think to cull out such lumber as was not in accordance with the contract, because the plaintiff could not by placing in a car load three quarters good and one quarter inferior, compel the purchaser to accept the inferior, and to pay for the same even on a *quantum meruit*.

If the vendor should pay freight for such inferior stuff he could recover the same from the vendor. In fact if the vendor commit a breach of the contract by not sending what was contracted for, or put the vendee to costs or expense improperly he must make it good to him.

It seems to me that to hold, as the defendant asks us to hold in this case, that because he found in some of the cars lumber not answering to the contract he could throw the whole of such car loads on the plaintiff's hands in Hamilton, would be to do a great wrong, and to establish a rule which would very much embarrass trade.

The defendant did not ask to have submitted to the jury at the trial the question as to whether the lumber on the rejected cars had been so admixed with other inferior lumber as to destroy its distinctive character. His learned counsel, with his wide experience in such class of cases, no doubt perceived the futility of such a course; and it would be idle for us to send the case down for such purpose when the parties, as I have said, have agreed that the reduction on the whole invoice should be about four and a half per cent. No verdict finding that such a percentage would destroy the distinctive character of the quantity in which it was found could be allowed to stand.

say nothing as to the rights of the parties had the first car load been composed of inferior lumber so admixed with the other as to render necessary labour and expense in culling.

It may be that *Simpson v. Crippin*, L. R. 8 Q. B. 14, and *Brandt v. Lawrence*, 1 Q. B. D. 344, settle the rights of the parties. I desire to confine my judgment to the facts of this case.

I have examined the case of *Towers v. Dominion Iron and Metal Co.*, C. A., noted in C. L. J. of June, 1885, p. 219, to which Mr. McCarthy referred us, but find that the judgment turned on the finding in fact that there had been an acceptance of the goods in St. Catharines.

In my opinion this motion must be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

IN RE CLARK AND THE MUNICIPALITY OF THE TOWNSHIP
OF HOWARD.

Drainage by-law—46 Vic. ch. 18, sec. 588 (O.)—Validity of by-law—Costs.

A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation is invalid. A by-law therefore defining the duties of inspectors of drains and enacting (1) That obstructions wilfully placed in drains should be removed by the parties placing them there or at their expense, without regard to whether such parties owned the lands through or between which such drains were situate. (2) That if such obstructions were removed by the council the cost should, on completion of the work, be paid by the council, instead of enacting that it should be so paid only in the event of the party chargeable with the obstruction failing to do so. (3) That if paid by the council the amount of such cost should be charged on the collector's roll against the lands of the party chargeable, instead of only against the party himself. (4) Because no appeal was provided for against such charging of such cost upon the collector's roll, was quashed with costs.

Aylesworth moved to quash "a by-law, entitled a by-law to define the duties of the inspectors of drains in the township of Howard," on the following grounds :

1. The said by-law is not supported by any legal warrant or authority, and is wholly beyond the power of the municipal council of the said township to pass or enact.

2. The said by-law, so far as the same is a re-enactment of the statute 46 Vic. ch. 18, sec. 588, (O.) is wholly unnecessary and improper as municipal legislation, and so far as the same departs from the said statute, or is contradictory thereto, is wholly illegal and void.

3. The said by-law does not profess to be limited in its application to drains constructed or opened up, under the provisions of the Ontario Drainage Act, but applies in terms to all drains whatever.

4. The said by-law enacts that obstructions wilfully placed in any drain shall be removed by the parties by whom such obstructions were so placed there, or at the expense of such parties, without regard to whether such parties own the lands through or between which such drain is situate.

5. The said by-law provides that if such obstructions are removed by the council, the cost thereof shall in every case, on completion of the work, be paid by the council to the party performing the work, instead of enacting that such cost be paid by the council only in the event of the party who placed the obstructions in the drain failing to pay such cost.

6. The said by-law directs that in the event of such cost being paid by the council the amount thereof be charged on the collector's roll against the lands of the party who should pay, instead of only against the party himself.

7. The said by-law makes no provision for any appeal from charging such cost upon the collector's roll.

The by-law was as follows :

"A by-law to define the duties of inspector of drains in the township of Howard.

Whereas it is necessary and expedient to define the duties of inspectors of drains in the township of Howard.

Be it therefore enacted by the Municipal Council of the township of Howard, in Council assembled, as follows :

1st. That it shall be the duty of the drain inspector of each drain and its branches, when notified by the council of the municipality, or the head thereof, to have all obstructions removed from the said drain or of the branches thereof, which prevent the free flow of the water, and if the said obstructions have been wilfully placed in such ditch, drain, creek, or water course, by any party or parties, the said inspector shall notify him or them in writing within two days to cause such obstructions to be removed, and if the said party or parties neglect or refuse to have the same removed, then the said inspector shall have the said obstructions removed without delay at the cost of the said party or parties, and when completed the council shall pay the amount to the party performing the work, and the clerk of the municipality shall place such amount upon the collector's roll against the lands of the party or parties, with ten per cent. added thereto. And all drift wood or rubbish which may collect and impede the flow of the water the inspector shall cause to be removed and charged to the said drain."

Pegley, contra.

September 8, 1885. O'CONNOR, J.—The first objection is general in its terms—points out nothing specific.

The fourth, fifth, sixth, and seventh grounds of objection are specific, and in my opinion well taken, and are cumulatively, if not severally, fatal to the by-law. It appears in some respects to have been intended to operate under section 588 of the Municipal Act (46 Vic. ch. 18), (O.), and in part corresponds with that section; but in other respects it seems to have been intended to be supplementary to and different from the statute.

At all events it varies from the provisions of the section and statute referred to. The section 588 is new, and I know of no other section of the same or any other Act giving even a semblance of authority for such a by-law. Its variance from the provisions of the statute, especially in matters of so delicate a nature as those affecting the rights of property, and of taxation, is decidedly fatal to its validity; nor can it be saved by the argument stoutly urged by Mr. Pegley, that its provisions in that regard are harmless, inasmuch as the provisions of the statute are unaffected by the by-law. The statute is, indeed, unaffected; but the by-law assumes to provide for a wider range of circumstances, and directs proceedings different from and apparently independent of those directed by the statute, and is, at least, misleading; likely to lead to confusion, and not unlikely to produce trouble; and for that reason alone should not be allowed to stand.

Besides, unless the by-law was intended to operate outside the statute, *ad extra*, it was and is wholly useless, for then it would be a mere useless and a foolish confirmation or indorsation of the Act of the Legislature.

The enactment of the statute having been but a short time in force, there does not appear to be any case decided as regards the need or validity of a by-law under it; but amongst the older cases are some in which analogous questions as to validity have been decided; for instance *Bogart v. The Town Council of Belleville*, 6 C. P. 425; *In re Hagaman et al. and The Corporation of Owen Sound*,

20 U. C. R. 583 ; *In re Campbell and The Corporation of the City of Kingston*, 14 C. P. 285 ; and the more recent case of *In re McLeod et al. and The Corporation of the Town of Kincardine*, 38 U. C. R. 617.

The by-law is composed of only one provisional clause, and though part of it is innocent, and might be allowed to stand, yet that and the vicious part are so blended that they cannot be separated ; the whole must therefore be quashed, and with costs, as usual in such cases. An additional reason for allowing costs is that the Reeve and council were notified in writing in January last, that unless the by-law was 'repealed at once' proceedings would be taken to quash it, but they paid no attention to that warning.

Order nisi absolute quashing by-law.

[CHANCERY DIVISION.]

THE CORPORATION OF THE MUNICIPALITY OF THE
TOWNSHIP OF ADJALA V. McELROY ET AL.

Principal and surety—Municipal treasurer—Annual re-appointment—Misconduct—Condoning misconduct—Release of sureties.

A treasurer was appointed by the plaintiffs under R. S. O., ch. 174, by sec. 274, of which all officers appointed by a council, shall hold office until removed by such council. He furnished a bond dated the 1st of November, 1880, conditioned that if he should "well and truly discharge the duties of township treasurer so long as he shall remain in the said office, and shall render true and just accounts of all moneys, &c., as shall come and have come into his hands during his continuance in said office, and hand the same promptly into the hands of his successor in office, then, &c." He was re-appointed annually for several years.

Held, the re-appointments were not equivalent to removals and re-appointments, but were rather a retention in office of the same treasurer, and that the sureties were not in consequence thereof discharged.

To determine a man's office as treasurer under the statute, there should be some positive act of removal by which he is displaced and another appointed, or by which the office, though continued in the same person, becomes different in some material point. Mere implication arising from formal re-appointment should not be deemed equivalent to such act of removal.

The treasurer having failed to account for large sums, the council of the plaintiffs caused a letter to be written to him on the 27th of February, 1882, requiring him to settle all claims by a certain day, otherwise a special meeting would be called to consider his case. He failed to settle, and the council did not carry out their threat. In 1883 the council again becoming dissatisfied with the treasurer, passed a resolution that no further payment should be made to him, but that all moneys should be paid into a certain bank. In 1884, the council for that year rescinded this resolution and permitted the treasurer to receive the accumulated funds. No notice of any kind was given to the sureties.

Held, that the plaintiffs had failed to perform their duty by retaining the treasurer in office after they had become aware of his defalcations and continued default; and that their failure to do so was a breach of duty towards the sureties, which released the latter from all liability after the 27th of February, 1882. A reference was granted at the plaintiff's election to take an account of the amount due under the bond to that date, and in default of such election, the action was dismissed, with costs.

THIS was an action brought by the corporation of the municipality of the township of Adjala, against William McElroy, Patrick McElroy, Patrick Langley, Thomas Langley, Patrick McElroy, the younger, and The Canada Permanent Loan and Savings Company, the first three

defendants being the bondsmen for the due performance of the duties of, and accounting for all moneys received by William McElroy, who was treasurer of the plaintiffs, and the last three being the transferees of the properties conveyed away by the bondsmen, the transfers of which were alleged to be fraudulent.

The plaintiffs' statement of claim alleged the appointment of William McElroy as township treasurer, in 1864: that on November 1st, 1880, he and the defendants Patrick McElroy and Patrick Langley, executed a bond for the due performance of his duties, and due accounting for all moneys received by him during his continuance in office: that he ceased to be treasurer on August 13th, 1884: that between the date of the bond and the said 13th August, 1884, he received and refused or neglected to account for moneys of the plaintiffs to a large amount, and they claimed to recover such moneys from the defendants William McElroy, Patrick McElroy, and Patrick Langley.

There were also allegations attacking certain transfers of properties by the said William McElroy, Patrick McElroy, and Patrick Langley to the other defendants, which transfers it was claimed were fraudulent as being for the purpose of defeating and delaying creditors.

The statement of defence of Patrick Langley set up that the bond was only operative for the year current when the same was executed, and for that year all the conditions thereof were performed: that at the end of the year 1881, the plaintiffs caused the accounts of the defendant William McElroy to be taken, and that there was nothing then due, and that even if there was the plaintiffs were estopped from claiming the amount as from the change for the worse since that time in the financial position of the defendant William McElroy, he the said defendant Patrick Langley would be unable to reimburse himself for any sum there might be found due by William McElroy: that a similar account was taken in the early part of the year 1883: that the plaintiffs dismissed the said William McElroy in 1883, whereby the said bond ceased to be in operation

and force, and that the said William McElroy had duly accounted for all moneys, and performed all duties up to that time: that the plaintiffs knew of certain irregularities and misconduct in the past of the said William McElroy previous to the signing of the said bond, and fraudulently concealed the same from him (Patrick Langley) knowing that if he had been fully informed that he would have refused to sign the said bond: that the said irregularities increased, and the financial position of the said William McElroy became worse from year to year to the knowledge of the plaintiffs, and while they permitted the same they concealed the facts from the defendant Patrick Langley, and kept re-appointing the defendant William McElroy, and thus by their laches released the defendant Patrick Langley: that in 1883, in consequence of irregularities and misconduct and failure to account and pay over, the plaintiffs took the control of the township funds from the defendant William McElroy, and appointed other custodians therefor, but subsequently notwithstanding notice from the defendant Patrick Langley that he would no longer be responsible on said bond, they gave back the control of the said funds to William McElroy, and allowed him to collect more moneys.

A separate statement of defence to the same effect was also put in by Patrick McElroy the other bondsman.

Statements of defence were put in for the other defendants, and all statements of defence denied any fraud in the transfers of the lands, which issue on the evidence was, however, found against the defendants by the learned Chancellor.

The action was tried at the sittings held at Barrie, on March 12th, 1885, before Boyd, C.

It appeared from the evidence that William McElroy had been treasurer of the township for some years previous to the giving of the bond in question, and that he was appointed treasurer from time to time by resolutions and by-laws in the years 1879, 1880, 1881, 1882, and 1883: that he was during that time behind in his accounts, and that

the council were continually trying to make him pay up, but that they kept the matter quiet and did not notify his sureties. On February 27th, 1882, the township clerk, at the instance of the council, wrote him "to have all claims due the county (and others) settled," &c., otherwise a special meeting was to be held to take the matter into consideration, and in the fall of 1883, they went so far as to stop the payment of public moneys to him, but the council of 1884 rescinded the resolution doing this and allowed him to receive the moneys again, which he retained and misappropriated.

Lount, Q. C., for the plaintiffs, Sureties cannot be released by anything done during the currency of the bond. The evidence does not shew that the council had any knowledge of any misconduct on the part of the treasurer which required to be communicated to the sureties. There was no necessity of informing the sureties of the action of the council whereby the payment of moneys to the treasurer was stopped in 1883. The action of the council in 1884 in allowing him again to receive the funds was *bond fide*, and in the interests of the township: *Peers v. Oxford*, 17 Gr. 472; *East Zorra v. Douglas*, 17 Gr. 462; *Frontenac v. Breden*, 17 Gr. 645.

Pepler, for the defendants other than Patrick McElroy and the Canada Permanent Loan and Savings Company. The bond only made the sureties liable for the term of the office for which it was given, and that office expired at the next appointment of treasurer, whether the same man or another was appointed: *Cambridge v. Dennis*, El. B. & El. 659; *Regina ex rel. Ford v. McKay*, 5 P. R. 309; *Chapman v. Beckington*, 3 Q. B. 703; *Dover v. Twombly*, 42 N. H. 59; *Chelmsford Co. v. Demarest*, 7 Gray 1, (Mass.) There was a gross want of good faith on the part of the township since 1880. Mere balances would not be enough to discharge the sureties, but we find these increasing steadily and the council casting about for means of relief: *Taylor's Equity Jurisprudence*, 106, s. 245; *Pollock* on

Contracts, 3rd ed., 259-261; *Victoria Mutual Fire Ins. Co. v. Davidson*, 3 O. R. 378; *Canada Agricultural Ins. Co. v. Watt*, 30 C. P. 350; *Gananogue v. Stunden*, 1 O. R. 1; *The Cosgrave Brewing and Malting Co. v. Starrs*, 5 O. R. 205; *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Wilson v. York*, 46 U. C. R. 289.

Lennox and Hearn, for the defendant Patrick McElroy. In February, 1882, the council considered William McElroy's position critical, and made no appointment of treasurer until November of that year as they were awaiting results, and when he paid up in October they reappointed him. They should have reported his misconduct to the sureties. His appointment in 1883 was made after knowledge of the facts, and was a fraud on the sureties. The balance for 1883 was paid up, and an application of payments discharges the sureties: *East Zorra v. Douglas*, 17 Gr. 462; *Essex v. Park*, 11 C. P. 473. The evidence shews bad faith on the part of the council in concealing matters from the sureties: *Regina v. Pringle*, 32 U. C. R. 308; *McDonald v. May*, 5 U. C. R. 68; *Regina v. Bonter*, 6 O. S. 551.

H. H. Strathy, in reply. There is a distinction to be made between councils and private persons. There is no means of discovering the relations between masters and servants, but there is between a council and a treasurer: *Phillips v. Foxall*, L. R. 7 Q. B. 666, refers to ordinary employees, not to corporations. See also *Beverly v. Barlow*, 10 C. P. 178.

April 22nd, 1885. *BOYD, C.*—The bond given by the defendants as sureties for the due performance of the duties of the treasurer of the township of Adjala was dated in November, 1880. By the law then in force, "Every municipal council shall appoint a treasurer who may be paid either by salary or by a percentage, and every treasurer before entering upon the duties of his office, shall give such security as the council directs for the faithful performance of his duties, and especially for duly accounting for and paying over all moneys which may come into

his hands; and it shall be the duty of every council in each and every year to inquire into the sufficiency of the security given by such treasurer, and report thereon: R. S. O. c. 174, s. 246.

By section 248, every treasurer shall prepare and submit to the council half-yearly a correct statement of the moneys at the credit of the corporation, whose officer he is.

Section 249 provides in case any treasurer is dismissed from office, or released, it shall be lawful for his successor to draw any moneys belonging to such municipality.

By section 274, all officers appointed by a council shall hold office until removed by the council; and by section 275, a municipal council may grant an annuity to an officer who has been in the service of the municipality for at least twenty years. This last section originates in 36 Vict. c. 48, s. 221 (O.)

The other section 274, is derived from 29, 30 Vic. c. 51, s. 177, passed in August, 1866. This, however, is well-nigh identical with the earlier provisions of the law to be found in 12 Vict. c. 81, ss. 171 and 173, which provide that the treasurer shall hold office during the council's pleasure, and that he shall hold his office until removed therefrom by the council.

In *Beverly v. Barlow*, 10 C. P. 178, it was held that the appointment of treasurer under 12 Vict., was not an annual one, although by the by-law passed on the defendant's first appointment in February, 1853, it was declared that he was appointed for the then present year. Yet, upon its appearing that he was continued as treasurer thereafter without any new appointment, the Court held that the effect of the statute was to make him treasurer till he was removed therefrom by the council, and his sureties were held liable for defaults occurring after the year 1853. The argument in that case brings out the point wherein it differs from the present case. Mr. Richards argued thus: "The continuing a man in office is not a removal and re-appointment, and there is no by-law subsequent to that of 1853." (p. 181.)

In that regard this case more nearly approaches *Regina ex rel. Ford v. McRae*, 5 P. R. 309, decided in Chambers by Mr. Justice Morrison, in February, 1870. In that case the treasurer was appointed by by-law for 1859, and again by by-laws for 1860 and 1861, respectively. The defendant became his surety in 1861 by bond which provided for the treasurer well and duly accounting "during his said office as treasurer, to which he has been appointed," and that "upon his discharge, or at the expiration of his term of office," he should render up books and accounts, &c. The treasurer was then re-appointed in 1863 and in 1864. In the previous years his appointment was as to time silent; in 1864, his appointment was for that year: in the following years he was re-appointed without specifying the period till 1868, when his term was limited to that year. It was held that as the council made annual appointments, and as the bond referred to the expiration of the term of office, it was reasonable to assume that the engagement of the surety was only for the municipal year. The Judge then thus proceeds: "It is true, as argued by Mr. Harrison, if the treasurer had not been re-appointed, that under the 117th section of the Municipal Act he would hold office until removed by the council. (That appears to be a misprint for the 171st section.) But the fact of his reappointment in 1863 implied, at all events, that his term of office expired at the end of 1862; and his reappointment by by-law in 1864, expressly limited his appointment to that year. At the end of that year his term of office certainly expired, and as he made no default, but faithfully performed his duty * * up to that period, his sureties * * were discharged from all liability, if they had not been discharged at the end of 1861 or 1862. There are no words in the condition indicating that the sureties engaged to be liable upon his reappointment from time to time."

The precise point is not specifically decided, though the inclination of the Judge's opinion is, that the mere re-appointment was in law a termination of the current

appointment and the beginning of a new term of office. Such is apparently the view of Mr. Justice Crompton, in the case there cited of *Mayor, &c. of Cambridge v. Dennis*, El. B. & El. 659, who says. "the surety executing such an instrument is to be taken to be giving security only in respect of the existing office. When there is a re-appointment he has a right to say that the office is not the same." But I doubt that such a conclusion is really involved in his language.

In the *Cambridge Case* the office was at the date when the bond was given no more than an annual one and afterwards by statute it was extended to an office during pleasure. The declaration averred the first appointment, while the office was annual and then alleged subsequent annual appointments of the same person when the office was during pleasure and the Court decided that the tenure under the last appointment was distinct from that under the annual appointment existing when the bond was given and for this held the surety to be discharged. The language of Crompton, J., is to be read *contra subjectam materiem* and means that the reappointment was to an office of specifically different tenure from that to which the bond applied.

The defendants' bond now under consideration is conditioned thus: "If William McElroy shall well and truly discharge the duties of the office of township treasurer so long as he shall remain in the said office, and shall render true and just accounts of all moneys &c., as shall come and have come into his hands during his continuance in said office, and hand the same promptly into the hands of his successor in office."

Now apart from technicality, McElroy had no successor in office till he was superseded by the appointment of the present treasurer in 1884, and from the date of the bond in 1880 till he was so removed from office he remained in the office of treasurer, and all that period can properly be spoken of as his continuance in office. By the Act in force when this bond was given the

treasurer was to hold office until he was removed by the council and I think it savours of over-refinement to treat the resolutions and by-laws passed at irregular periods as to his appointment and reappointment as tantamount to a removal or dismissal from office, and to the appointment of a successor during any portion of the period. You do not start with an annual office as in *Cambridge v. Dennis*, and you have not the same state of facts as in *Regina ex rel. Ford v. McRae*. The language of the bonds is different: the manner of acting on the part of the corporation is different; and by the terms of the law then in force, the appointment was during pleasure, (by s. 171 of 12th Vic.) which is not precisely the same as holding office till removed therefrom. It is preferable to regard a resolution or by-law which reappoints the same person to the same office as an acceptance and continuance in office of the then incumbent rather than to treat it as a removal from office and a new appointment thereto, so as to invalidate such a bond as this. There is here no re-appointment on different terms, but a retention in office upon the same terms and with the same duties: *Bamford v. Iles*, 3 Exch. 386. In short, I think the statute means that to determine a man's office as treasurer there should be some positive act of removal by which he is displaced and another appointed, or by which the office, though continued in the same person, becomes different in some material point. But mere implication arising from formal reappointment should not be deemed equivalent to such act of removal. I hold that McElroy continued in office till his successor was appointed which was coincident with his removal and that the bond was a continuing security for this period during which he continued in office as treasurer.

In the cases of *East Zorra v. Douglas*, 17 Gr. 462; and *Peers v. Oxford*, 17 Gr. 472, the complaint was as to the conduct of the council in concealing material matters from the sureties at and before the time when the security was given: in the present case the complaints are mainly

founded on the conduct of the council during the currency of the bond. I see no reason to doubt that the principles now well established by the cases of *Phillips v. Foxall*, L. R. 7 Q. B. 666, and *Sanderson v. Aston*, L. R. 8 Ex. 73, are applicable to municipalities and to all cases where the master or employer has the power to dismiss the servant or official employed. The *ratio decidendi* of these cases has been thus well elucidated by Palles, C. B., in *Byrne v. Muzio*, 8 L. R. Ir. 396, 410, "There should be, in the person who is suing, and to whom the knowledge of the fraud, irregularity or misconduct is traced, a power of dismissal. * * The power of the employer to dismiss for misconduct is a power the exercise of which, when misconduct comes to his knowledge, the surety has the right to call for, and if the employer condones the misconduct in such a way as to deprive himself of the power of dismissal, he has deprived the surety of one of the rights which he, the surety, would have if he stood in the place of the employer, and therefore the surety is discharged by the ordinary rules that regulate questions between principal and surety."

The point to be considered is, whether such breach of duty is pleaded and proved on the part of the treasurer as would have entitled the corporation to dismiss that officer, or as would have justified them in taking that step. As said by Kelly, C. B., in *Sanderson v. Aston*, L. R. 8 Ex. 77, though no dishonesty is shewn by the plea * * yet the employed by failing to pay over money which he has received may commit a breach of his duty, which would entitle his employer to dismiss him."

In this case we have a breach of duty in this respect coming to the knowledge of the plaintiffs proved unmistakably by the letter of the 27th February, 1882, written by the township clerk at the instance of the council to the treasurer. In this he is called upon "to have all claims due the county (and others) settled before next Saturday, and additional security procured," otherwise a special meeting was to be held to take the situation into consideration.

The treasurer did not heed the call thus make upon him, did not discharge the claims referred to, and the council did not carry out their threat, and did not interfere with his incumbency of the office.

At the date of that letter the treasurer had (as the council knew) over \$7,000 in his hands received from the collectors for 1881, out of which no payments of any considerable sums appear to have been made till late in the fall of that year, and probably after the receipt of that years taxes in November and December. This cannot be likened to a case of inactivity as between a creditor and debtor in which the mere laches do not discharge a surety. Public moneys here reach the hands of the treasurer, which it is his statutory duty to pay over promptly to the proper recipients. He has no right to retain these moneys for his own use for a single moment. The council knew of his receipt of these moneys, they knew of his failure to pay within the statutory period, they communicate with him and require him to pay. Upon his continued default it was their plain duty to have dismissed him from office as a person who had improperly withheld or appropriated municipal moneys, and their failure to do so was a breach of duty towards the sureties which entitles them to be discharged. If, notwithstanding the refusal or the inability of the treasurer to account for these moneys, the council determined to keep him on in office they should not have thus acted without giving notice to the sureties and obtaining their sanction to remain liable for future defalcations.

I hesitated to give effect to this ground of discharging the sureties, because it is not specifically pleaded, but all the evidence was given without objection, and the matter was fully discussed in this aspect before me, and it would not be unreasonable in such circumstances to allow all necessary amendments to be made to present this defence on the record. If, however, I am wrong as to the effect of this conduct, I have no doubt as to what next occurred.

When we pass on from this to the transaction in the year 1883 (respecting which the facts are sufficiently pleaded),

my conclusion is, that the council then so acted as to discharge the sureties from any subsequent default on the treasurer's part. In the fall of 1883 the council became dissatisfied with the failure of the treasurer to pay over the county rates promptly and faithfully, passed a resolution, and took steps whereby the further payment of public moneys to that officer were stopped, and instead thereof all such moneys were ordered to be paid, and were paid into the office of the Bank of Hamilton. The new council in 1884 rescinded the resolution and allowed all the funds so accumulated to pass into the hands of the treasurer who retained and misappropriated them. This was done without notice to the sureties, and without any precautions whatever being taken to see that the moneys were properly applied. This conduct appears to me so utterly inexcusable as to afford most cogent evidence of collusion with the treasurer in his malversations. It was such gross negligence (to use the mildest phrase) as worked a fraud upon the unwarned sureties. If the treasurer was an unfit recipient of the public moneys at the time when his functions were suspended, and he was practically superseded by the council of 1883, (and of this I have no doubt), he was equally unfit to become the custodian of those same moneys in 1884. All the circumstances of the case shew that the council was not justified in restoring their confidence or their moneys to this disgraced official. It was plainly the duty of the council to have dismissed this officer when he became unworthy to be trusted with the receipt of public moneys.

Upon the whole case I think that the line of liability on the part of the sureties should be drawn at the time when the treasurer was in default for non-compliance with the letter of February, 1882, and it will be referred to the Master to ascertain the extent of the liability on the bond at that date.

An attack was made upon the transfers of property made by the sureties, and was fully gone into without objection upon the part of the defendants. The suit was not properly constituted for this purpose, but an amendment may be

allowed so that it shall be on behalf of all creditors. There is no doubt that as against creditors the conveyances impeached cannot stand, and there should be a declaration to this effect if it is found that the plaintiffs are creditors. It was said that by the applications of payments made subsequently by the treasurer, all arrears in February, 1882, would be wiped out, but if the plaintiffs do not adopt this view it will be open to them to prosecute a reference as to the state of accounts and the extent of the sureties' liability. If no such reference is sought, the action is dismissed, with costs; if it is asked, further directions and all costs will be reserved.

After I had written the foregoing opinion I came across the case of *President, &c., of Amherst Bank v. Root*, 2 Met. 522 (Mass.), in which the question of the effect upon sureties of re-appointing the same person to an office which is held during pleasure is very fully and very ably investigated. That was in reference to the cashier of a bank whom the directors appointed from year to year, but who, by the terms of the statute of incorporation, was to hold office until removed or another person was appointed in his stead. Shaw, C. J., said at p. 539, "The election of the cashier to an office which he already holds, and would hold without election, must be regarded as a manifestation of their will and intent that he should *continue* to hold the office for another year, unless there should be cause afterwards to remove him. That such an election is considered by the directors themselves as the continuance of an existing office, and not the commencement of a new one, is manifest from the fact that they require no new bonds." Dewey, J., in a dissenting judgment at p. 555 does not call in question the correctness of the decision in *Dedham Bank v. Chickering*, 3 Pick. 335 (Mass.) where it was held that successive re-elections of a cashier, who had been originally appointed for an unlimited period, do not discharge the liability of the original sureties, as to future defalcations. And he further says: "If the appointment was an unlimited one, it might be true that

sureties, who became such under that form of appointment, might not be discharged of their liability by a subsequent re-election of the same individual."

Lord Mansfield's view appears to be to the like effect in a case of *Dance v. Girdler*, 1 B. & P. N. S. 38, 40, cited in these Massachusetts Reports.

G. A. B.

[COMMON PLEAS DIVISION.]

BLAGDEN V. BENNETT.

Slander—Privileged occasion—Malice—School trustee—Ratepayer—Pleading.

The plaintiff, a school trustee, with another trustee, under the authority of the school board, purchased a quantity of firewood for use in the school house. In December, shortly before the municipal and school trustee elections, the defendant and H., another school trustee, were discussing the taxes, when defendant said that the trustees had paid too much for the wood: that plaintiff had culled it, and sold the best of it, and had drawn the culled wood to the school house: and, on H. remonstrating with him, said: "Oh, but he did, and I can prove it": that he could prove it by a person named N. Subsequently in the same month, a discussion took place between defendant and B., first as to council, and then as to school matters, when defendant related the conversation he had had with N., in which he had said to N. that the wood was dear, and that N. had said that it was No. 2 at that: that there was something strange about the wood, and it must have been culled, for they bought No. 1, and drew No. 2 to the school house. In an action for slander,

Held, ROSE, J., dissenting, that the words having been spoken by a person interested to another, also interested, the occasion was privileged; and in the absence of proof of express malice no action would lie.

Quære, whether defamatory words spoken of a person holding an elective office with regard thereto, not followed by special damage, are actionable when they would not be so when spoken of the holder in his private capacity.

Held, also, that the omission to plead such privilege as a defence did not preclude the defendant from setting it up at the trial.

THE plaintiff sued in slander, his statement of claim alleging that at the time the slanderous words complained of were spoken he was a school trustee in school section No. 5, in the township of East Flamborough, and in that

capacity with one John Hunter, another school trustee, acting under the authority of the Board of School Trustees of the section, he purchased a quantity of fire wood for use in the schoolhouse of the section at \$4.75 per cord, and caused the same to be delivered at the schoolhouse; and the defendant in a conversation with John Harper maliciously spoke of the plaintiff as such school trustee the words: "Blagden had drawn the wood to the schoolhouse, and that he had culled the wood and sold the best of it, and had drawn the culled wood to the schoolhouse; and I can prove it." On another occasion he spoke the same words to one Hermanus Buckley.

The defendant, by his statement of defence, admitted that the plaintiff was a school trustee; and denied all the other statements in the statement of claim.

The cause was tried before Galt, J., and a jury, at Hamilton, at the Spring Assizes of 1885.

It appeared by the evidence that in the month of December, 1884, not long before the municipal and school elections would take place, the defendant had a conversation with Charles Harper in the market place, at Hamilton, the said Harper being one of the school trustees of the section, and the defendant a ratepayer therein.

Harper was called as a witness for the plaintiff, and gave in substance the following account of the conversation: "He commenced by talking about the taxes being high. Well, I stated, they might be a little high, but they will likely be higher. From this he went on and said we paid too much for the wood, and the wood was not of the quality according to the price; and he said Mr. Blagden culled that wood, or rather in these words: 'yes, he culled that wood, and drew the best of it away, and sold it, and drew the rest of it to the schoolhouse.' At that I remonstrated with him, that I did not believe it; and he said: 'Oh, but he did, and I can prove it.' He said he could prove it by Thomas Nicholson. We were referring to the wood that had been drawn to the schoolhouse. Mr. Blagden and Mr. Hunter had drawn the wood."

In cross-examination he said: Mr. Bennett stated "that Mr. Blagden had culled the wood, and drew the best of it and sold it, and drew the culls to the schoolhouse. He quoted Nicholson as proof. Nicholson was his authority. I was one of the trustees, and he was one of the ratepayers."

The conversation with Hermanus Buckley, was given by Buckley, in his evidence substantially as follows: "I had a conversation with Bennett about school wood. * * It was got from Samuel Tansley. The conversation took place at the church on Christmas eve, last year. He said Blagden drew the wood. He said he was talking with the two Nicholsons, John and Thomas. The first start of the conversation was about council matters. He was talking to John Nicholson that the taxes were lower; and he told Nicholson he would vote for him again, but the school taxes were raised. This was a conversation that he was telling that took place between him and the two Nicholsons. He said the wood was dear, and Nicholson said it was number two at that. Then he went on talking; I cannot tell you the whole; but, he said, there is something strange about the wood; it must have been culled for they bought number one wood and they drew number two to the schoolhouse. He said it must have been something strange how they could draw number two to the schoolhouse when they bought number one."

In cross-examination he said: "I am a ratepayer in the section, and auditor of the school books. I and Mr. Bennett were talking about school matters when this question came up. We met there at the Christmas tree, on Christmas eve, and we first talked about the council; and then we got on to the school business, and he was complaining that the taxes were raised, and for my part, I know the taxes were raised. I understood him to repeat what Nicholson told him."

It appeared, by the evidence, that plaintiff and Hunter bought the wood to be delivered at the schoolhouse at \$4.75 a cord from one Samuel Tansley; and then agreed

with Tansley to haul it for him a distance of about five miles for \$1 a cord; and that the plaintiff also bought wood for himself from the same Tansley, which he hauled just afterwards to Hamilton and sold on the market there; and also that the plaintiff drew wood to Hamilton for Tansley.

At the close of the plaintiff's case, the defendant's counsel submitted that the alleged slanderous words were spoken on a privileged occasion, and there was no evidence, outside of the words, of malice.

The learned Judge adopted this view, and dismissed the plaintiff's action.

In Easter sittings, May 21, 1885, *Carscallen* obtained an order *nisi*, calling on the defendant to shew cause why the judgment for the defendant should not be set aside, and a new trial had between the parties, on the ground that the words were not privileged; and even if they were privileged, there was no defence of that kind raised by the defendant's statement of defence.

During the same sittings, May 30, 1885, *Carscallen* supported the order *nisi*. The words spoken were slanderous. There was a clear charge of corruption against the plaintiff in his office of trustee repeated over and over again. The charge amounted to a criminal charge. The communication was not privileged; neither was the occasion privileged; at all events, there was evidence of express malice which rebutted the privilege. The question was for the jury, and the case therefore should not have been withdrawn from them. The words were clearly spoken of the plaintiff in his office as trustee. The alleged privilege should have been specially pleaded. He referred to *Hill v. Hart Davies*, 21 Ch. D. 780, 798; *Odgers* on Libel and Slander, 183-5; *Waller v. Loch*, 7 Q. B. D. 619; *Addison* on Torts, 3rd ed., 161; *Webb v. Beavan*, 11 Q. B. D. 609; *Belt v. Lawes*, 51 L. J. Q. B. N. S. 359.

Osler, Q. C., contra. The communication was privileged, and as it appeared from the plaintiff's own case that the occasion was privileged, the plaintiff cannot succeed

as there was no evidence of express malice, and the plea of privilege was not necessary. Moreover, on the evidence, the words could not be held to be spoken of the defendant in relation to his office of trustee. It is no part of the duty of a trustee to haul wood; and there was no allegation of special damage or evidence of it. If the words were not spoken of the plaintiff in relation to his office the words were not actionable without special damage being alleged and proved. He referred to *Clark v. Molyneux*, 3 Q. B. D. 237; *Wilcocks v. Howell*, 5 O. R. 360; *Fellowes v. Hunter*, 20 U. C. R. 382; *Odgers* on Libel and Slander, 64; *Tighe v. Wicks*, 33 U. C. R. 479; *Breeze v. Sails*, 23 U. C. R. 94.

June 27, 1885. CAMERON, C. J.—I am of opinion the decision of my learned brother was quite right, and that the occasion on which the alleged slanderous words were spoken was one of qualified privilege, protecting the defendant against an action in the absence of proof of actual malice.

It would be most disastrous in the public interest if a ratepayer in the defendant's position were not permitted to discuss the plaintiff's conduct, under the circumstances detailed in evidence, in the manner in which he did.

There can be no doubt, to a man of any sense of honour, it must be exceedingly galling to have it imputed to him that he has been, or could be, thought guilty of the dishonesty and meanness of culling wood, and using for his own purposes the good, and putting off on the School Board, whose interests it was his duty to protect, the culls. But the plaintiff, by engaging in an employment inconsistent with his duty as a trustee, laid himself open to the imputation, and the defendant, acting in good faith and without malice, should not be placed in peril by the discussion of his conduct. In speaking to the plaintiff's co-trustee Harper and the auditor Buckley the defendant only proposed to narrate what he had heard, and to express the opinion that there must be something strange about

the wood. From the distance the wood had to be hauled there would seem no ground for supposing the plaintiff did anything morally wrong in taking a dollar a cord for hauling it; but if what the defendant had heard had been true, that the wood taken to the school house was of an inferior quality to that taken by the plaintiff to Hamilton, his conduct would have been exceedingly reprehensible; and the defendant would have been thoroughly justified in calling this conduct in question.

Where the occasion is privileged, in the absence of evidence of express malice, the defendant is in the same position, though the charge is wholly untrue, as if it were true.

In *McIntee v. McCulloch*, 2 E. & A. 390, the late Chancellor VanKoughnet, in delivering the judgment of the Court, thus expresses himself on this point, at p. 391: "If the Judge rule that the occasion justifies the use of the words, what is there to leave to the jury? It is said the *bona fides* of their use, but that is established when the privilege is admitted; for the truth of the words is assumed to support the privilege; or at least the defendant is not called on to prove it."

The absence of *bona fides* would, I assume, be evidence of malice, but before such evidence can be submitted to the jury there must be affirmative evidence offered of the want of *bona fides*, and it cannot be inferred from the words themselves.

There is no doubt there are cases in which the Court has submitted the question of *bona fides* to the jury.

It was so done in the very recent case in England of *Howe v. Jones*, reported in the *Law Times* of the 30th May, 1885, 79 L. T. Journal, p. 81. In that case the defendant said to the plaintiff, a person in his employment, in the presence of others: "You stole my goods." The learned Judge held the occasion privileged; and that the words would be so if spoken honestly in the honest belief of their truth and not maliciously. The jury found the *bona fides*, but were unable to agree as to whether there was malice;

and the Judge upon the finding of *bona fides* directed judgment to be entered for the defendant.

Lord Coleridge, C. J., in giving judgment on a motion in term to set aside the judgment so entered said, at p. 81 there was "no ground for interfering; and if the jury had found the other way it could not have been sustained, for there was no evidence whatever on which a reasonable person could possibly have found that there was malice; and there was abundant evidence to satisfy the jury of *bona fides*, which in fact they had found. The occasion was most clearly privileged—a master in the presence of his partner expressing to his servant suspicions of his honesty. No doubt the privilege could be taken away by evidence that the words were not spoken honestly, but that the occasion was abused to the purposes of private malice. But this was for the plaintiff to prove, and he tried to prove it, and it was left to the jury, who, however, found that the words were spoken honestly."

In the case under consideration there was no evidence of *mala fides*, or want of belief on the defendant's part, that what he said was true. The dismissal of the action was right if, as I have assumed, my learned Brother decided correctly that the occasion was privileged; and as to this it may not be inexpedient to refer to some authorities bearing upon that question. The defendant as a ratepayer had unquestionably an interest in the subject to which the words related; and so had the persons to whom he is charged with speaking them.

In *Spencer v. Amerton*, 1 M. & R. 470, the defendant had addressed a letter to a meeting of ratepayers of a township called for general purposes, in which he complained of the plaintiff's extravagant expenses in his office of township constable; and required that he should be called upon by action or indictment to account for a sum of money received by him some years before, and which he was alleged not duly to have accounted for.

Baron Parke held the communication privileged, using his address to the jury, the following language: "There

is no doubt this is a communication which, if made *bond fide*, the defendant, as a party interested, might have made at a meeting by word of mouth. * * There is here no evidence on either side whether the defendant was, or was not, necessarily absent; but the communication being made by a party interested, must be held to be *prima facie* privileged, and therefore I think it was at all events incumbent upon the plaintiff to give evidence that the defendant's absence was wilful; without that evidence the point taken on behalf of the plaintiff does not, in my opinion, arise. In the absence of that evidence, can you come to the conclusion that the defendant was actuated by a malicious motive? If not, the occasion justifies him, and you must acquit."

I cite this case as it was the case of a ratepayer complaining of the alleged misconduct of an official; and I do not see any valid distinction between the case of a ratepayer making a statement to a meeting of ratepayers and to one ratepayer. It is the interest in the matter of complaint in both cases that creates the privilege.

In *Davison v. Duncan*, 7 E. & B. 229, at p. 232, in reference to the case of *Rex v. Creevey*, 1 M. & S. 273, where it was held a member of Parliament, who voluntarily published a corrected edition of his speech containing defamatory matter, was not exempt from liability on the ground of privilege, Lord Campbell, Chief Justice, said, "As *Rex v. Creevey* has been mentioned, I will add that, though I perfectly concur in the doctrine of *Rex v. Lord Abingdon*, 1 Esp. 226, that a malicious publication of his speech by a member of either house of the Legislature is not privileged, I should think a publication of a report of his speech by a member of the House of Commons, *bona fide* addressed to his constituents, would be privileged."

And Crompton, J., said:—"The privilege in such a case would arise, because the publication was a communication between a member and his constituents, and not because it was a true report of what took place in Parliament."

These observations seem to show that though matters may clearly be defamatory if written or spoken by a person having an interest in the matter to one also interested, whether the interest be in connection with a public or private subject, the protection of privilege is thrown round the communication, and in the absence of malice an action will not lie in reference to such defamatory matter. If the communication is made through a medium that reaches others than those interested in it, the privilege may be lost that would have covered it if only made to those so interested: *Holliday v. Ontario Farmers' Mutual Ins. Co.*, 1 A. R. 483.

I entertain very grave doubt as to whether defamatory words spoken of the conduct of a person holding an elective office in regard to such office not followed by special damage can be made actionable, the office not making that actionable which spoken of the holder of the office as a private individual would not be actionable; but in the view I have taken of the question of privilege it is not necessary to the decision of this case to determine whether this doubt should be solved in favour of the defendant.

It remains to be considered whether the defendant, by not setting up the privilege of the occasion, has forfeited or lost the defence that would otherwise have been open to him. I do not think he has.

It would have been better and more correct as a matter of precise statement if he had alleged the occasion was privileged. But the plaintiff is bound to make out his case. In his endeavour to do so his evidence discloses that the occasion was privileged, and therefore he should have known it and been prepared with evidence to establish express malice. The Court is not to give judgment according to the matter alleged but to what the facts established by the evidence in law demand. The pleadings should if necessary be amended; but as the gist of the action of slander is malice, and by what is made to appear in evidence there was not malice on the defendant's part,

but on the contrary the inference of malice that in the absence of privilege would arise, is rebutted, and the action fails.

The plaintiff's order *nisi* must therefore be discharged, with costs.

ROSE, J.—I quite agree that persons holding positions of public trust are open to have their public acts criticised, as also their private conduct, if it be of such a character as would unfit them for the proper performance of the duties of their office.

I do not, however, think it can be well contended that while those interested can criticise acts, they have the right to impute motives, or that an indiscretion on the part of an official will lay him open to an imputation of an entirely different offence.

While it is in the interest of the public that there should be full and fair opportunity for criticism, it is also in the interest of the public that such criticism should be fair and just.

The records of the past contain the names of many sensitive honorable men who have been driven out of public life by unfair attacks upon their reputation, and many men of similar character are prevented from serving their country because they are unwilling to subject themselves and their families to such attacks.

It is the honorable, sensitively honorable, man the public requires for offices of public trust and responsibility, and if the public, through the Courts, protect them from unfair criticism, then they will be willing to accept the offices, and not leave them to men who are not sensitive to criticism, whether fair or unfair, and who thus cannot be kept in check from wrong doing by the force of public opinion.

In the present case the plaintiff was entrusted with the duty of purchasing wood for the school of which he was a trustee. So far as appears in purchasing it, he acted fairly and honestly, and used his best judgment. He and one Hunter, under agreement with the vendor, drew or hauled

it to the schoolhouse, and received \$1 a cord for doing so. It is not contended that the work was not worth the sum paid for doing it. It is, however, clear that the plaintiff should not have engaged in work for which he and his co-trustees would have to pay out of trust funds; in other words he made a profit out of his trust.

By this impropriety he laid himself open to criticism, and could not have complained if his constituents had spoken sharply about it, although no doubt it seemed to him perfectly fair that he should do the work, charging and receiving fair wages for his services.

But admitting this, I cannot comprehend how this act and the liability to criticism therefor, gave license or privilege to charge him with culling out the best wood from the vendor's stock and appropriating it for his own benefit, and drawing the inferior wood to the school. It was, of course, not charged that the trustees were required to pay for more than they received, but that the plaintiff having purchased a quantity of wood from Tansley for \$4.50 per cord, culled out the best for himself, and drew the inferior quality to the school. To illustrate: If the wood in the pile was worth \$4.50 per cord, and there were say half superior and half inferior quality, the superior being worth \$5 per cord, and the inferior \$4 per cord, he, the plaintiff, taking the superior quality would by fraud obtain from the trustees fifty cents a cord. Such a charge, if not amounting to one of criminal misconduct, approaches so nearly to the line as to make the distinction to an honourable man an immaterial one.

It thus seems to me that the defendant took advantage of a privileged occasion, when he was justified in criticising the act of indiscretion mentioned, to make a charge wholly unwarranted and unjustifiable.

I am further of the opinion that the defendant exceeded his privilege by the language he used. What right had he to say, when remonstrated with by Harper, and told by Harper that he did not believe the charge, "Oh, but he did, and I can prove it?"

It was argued that the following sentence of the evidence: "He said he could prove it by Thomas Nicholson," shews he was merely repeating what Nicholson told him. I do not think so. It seems to me he was asserting a fact—asserting it as of his own knowledge, and that he was prepared to substantiate it by a witness. If he wished to make it clear that he was not asserting the fact of his own knowledge he could easily have answered, "Well, I cannot say of my own knowledge, but Thomas Nicholson told me so." On the contrary, he asserted most positively, "Oh, but he did, and I can prove it."

The language of Mr. Odgers in his chapter on qualified privilege—*Odgers on Libel and Slander*, Am. ed., p. 204—is appropriate: "If your only means of knowledge is hearsay, tell him so: do not state rumour as a fact; and in repeating a rumour be careful not to heighten its colour or exaggerate its extent. * * Do not speak with the air of knowing of your own knowledge every word you say to be the fact, when you are merely repeating gossip or hazarding a series of reckless assertions. If time allows, and means of inquiry exist, you should make some attempt to sift the charge before you spread it."

On the question of actual malice the above evidence should, it seems to me, have been submitted to the jury together with the following:

On the 2nd of January following the above referred to statement, there was a municipal meeting at Carlisle. The plaintiff and defendant met there, and the plaintiff said, others being present: "Is Mr. Bennett telling you about me stealing the wood. * * Then Bennett said 'You did,' and then he" (I understand "he" to mean Bennett) "rushed on his feet in a passion. * * He said 'You took the wood, I can prove it.' * * Bennett said, 'You took the wood, you are guilty or you would not mention it, and I can prove it.'"

The witness said that "Bennett was in a rage." How were these statements justifiable, or how could they be withheld from a jury on the question of express malice?

See again Mr. *Odgers's* work, p. 279 : " But if the expressions employed still appear uncalled for and in excess of the occasion, though taken in connection with what was in the defendant's mind at the time, then it would seem that the defendant must have spoken recklessly or angrily without weighing his words, and that is some evidence of malice to go to the jury."

To put my views in a sentence, I am of the opinion that the occasion when the defendant was justified or privileged in criticising the act of the plaintiff as a trustee was taken advantage of to make an unfounded charge of the grossest dishonesty: that the charge was made recklessly as of the defendant's own knowledge when he had no personal knowledge; and was repeated as of defendant's own knowledge, in a manner shewing recklessness and anger; and that the evidence should have been submitted to the jury.

In view of the fact that the learned Chief Justice and my learned brother Galt hold a different view, I cannot, of course, submit my opinion without feelings of diffidence. As I, however, entertain an opinion in the plaintiff's favour he is entitled to it, and I would not be justified in withholding either it or my reasons therefor.

In my opinion the order should be made absolute for a new trial. Costs to abide the event.

GALT, J., concurred with CAMERON, C. J.

Order nisi discharged.

[CHANCERY DIVISION.]

RIDDELL V. MCINTOSH ET AL.

Will—Construction—Lapse of devise—Life estate—Estate tail—Barring entail.

In one clause of his will, a testator devised certain lands to his son A. S. M. "as soon as he attains the age of 21 years for and during the term of his natural life," and after the determination of that estate to the sons of the body of A. S. M. in tail male, as they should be in point of birth, and for want of such issue, then to the daughters of the body of A. S. M. and the heirs of the body of such daughters, which daughters and their issue were to take as tenants in common, and for default of such issue, the lands were to be divided among the testator's other sons, or the heirs of their respective bodies who at the death of A. S. M. should be entitled to any part of the lands devised in tail in the will to hold to his respective other sons, and in default of such sons and of their issue at the death of A. S. M. then to the right heirs of A. S. M. for ever.

A. S. M. predeceased the testator.

Held, that thereupon the devise to A. S. M. lapsed, the whole scope of of the clause intending that A. S. M. should survive the testator.

In another clause of the will the testator devised certain other lands to his son W. M. "for and during and unto the end and term of his natural life," and after the determination of that estate to the sons of the body of W. M. in tail male, as they should be in point of birth, and for want of such issue to the daughters of the body of W. M. and the heirs of the body of such daughters, who were to take as tenants in common, and for want of such issue, the lands were to be divided amongst the testator's other sons, or the heirs of their respective bodies, who at the death of W. M. should be entitled to any part of the lands devised in tail in the will to hold to his said other sons respectively, or the heirs of their respective bodies in the same course of descent in tail as the other lands devised to them in tail respectively, and for default of such other sons and of their issue at the death of W. M. to the right heirs of W. M. for ever.

Held, that W. M. took a life estate, with remainder in tail male, to his first and other sons successively, according to priority of birth, and failing male issue, with a further remainder to his daughters. And though circumstances might arise in which W. M. would have an estate in tail by way of remainder after the intermediate limitations to his first and succeeding sons, yet he could not so deal with that ultimate remainder as to divest their right to take as purchasers.

THIS was an action brought by Isabella Riddell against William McIntosh and Robert McIntosh, his brother, claiming, amongst other things, an order declaring that the said Robert McIntosh held certain lands, devised by the will of William McIntosh the elder, then deceased, father of the defendants, as a trustee in fee simple for the defendant William McIntosh, an account of what was due to the plaintiff from the said defendant, and a sale of the lands.

For the purposes of the present report, it is sufficient to say that the action involved the construction of the will of William McIntosh, the elder, which was dated April 30th, 1842, and so far as it is necessary to set it out here was as follows:—

Item. All that parcel or tract of land and premises, being the north half of lot one, in the first concession of the township of Darlington aforesaid, containing, &c. I give and devise as follows, that is to say, to my eldest son, Amasa Stebbins McIntosh, (as soon as he attains the age of twenty-one years) for and during the term of his natural life, without impeachment of waste, and from and immediately after the determination of that estate, then I give all the said parcel and tract of land and premises to the first, and to all and every other son and sons of the body of the said Amasa Stebbins McIntosh in tail male, one after the other as they shall severally be in point of birth, the elder of such sons and the heirs male of his body to be preferred and to take before the younger of such sons and the heirs male of his or her body or bodies, and for want of such issue, then to all and every the daughter and daughters of the body of my said eldest son issuing, and the heirs of the body and bodies of all and every such daughter and daughters which said daughters and their respective issue are to take the said devised premises as tenants in common and not as joint tenants, and for default of such issue, then my will is that the same shall be equally divided between my other sons herein-after named, or their respective heirs of their respective bodies who at the time of the decease of my said son Amasa Stebbins McIntosh shall respectively hold or be entitled to any part of the estate, lands and premises devised in tail in this my will to hold to my said respective other sons and" (*quære*, in default of such other sons and) "of their issue at the time of the decease of my said son Amasa Stebbins McIntosh, then I give and devise the said premises last above mentioned to the right heirs of my said son Amasa Stebbins McIntosh for ever.

Item. All and singular that certain parcel or tract of land and premises, being the north three-fourths of lot number twenty-eight, in the second concession of the township of Clarke, containing, &c. I give and devise as follows, that is to say, to my second son William McIntosh, for and during, and unto the end and term of his natural life, without impeachment of waste, and immediately from and after the determination of that estate, I give all and singular the said lot or parcel of land last mentioned to the first and all and every the son and sons of the body of the said W. McIntosh in tail male one after the other as they shall severally be in point of birth, the elder of such sons and the heirs male of his body to be preferred, and to take before the younger of such sons, and the heirs male of his body or bodies, and for want of such issue, then to all and every the daughter and daughters of the body of my said second son issuing and the heirs of the body of all and every such daughter and daughters which said daughters and their respective issue

are to take the said demised premises as tenants in common, and not as joint tenants, and for want of such issue then my will is that the same shall be equally divided between my other sons herein named, or their respective heirs of their respective bodies, who at the time of the decease of my said son William McIntosh shall respectively hold or be entitled to any part of the estate lands, and premises devised in tail in this my will to hold to my other sons herein mentioned respectively, or the heirs of their respective bodies with and in the same course of descent in tail as the other lands and premises devised to them in tail respectively, and for default of such other sons, and of their issue at the time of the decease of my said son William McIntosh, then I give and devise the said premises last above mentioned to the right heirs of my said second son William McIntosh for ever."

It appeared that Amasa predeceased the testator, intestate, and without issue.

It also appeared that the only sons who survived the testator were the defendants and one Albert McIntosh.

It was arranged that the questions arising on the will should be first disposed of, and they were argued on February 10th, 1885, before Boyd, C.

B. B. Osler, Q. C., and W. Nesbitt, for the plaintiff, contended that Amasa having predeceased the testator as aforesaid, one-third of his share went to William; and that under the devise to himself, William took an estate tail which had been barred, and cited *Bradley v. Cartwright*, L. R. 2 C. P. 511; *Jesson v. Wright*, 2 Bli. 1; *Roddy v. Fitzgerald*, 6 H. L. 823; *Jarm. on Wills*, 4th ed., vol. 2, pp. 339, 345-7, 401, 403, 416, 497; *Theob. on Wills*, 2nd ed., p. 336-8; *Lawlor v. Lawlor*, in the Supreme Court, reversing case in 6 A. R. 312; *Eastwood v. Avison*, L. R. 4 Ex. 141; *Robinson v. Robinson*, 1 Burr. 38, 2 Ves. sen. 225; *Bamfield v. Popham*, 2 Vern. 449, 1 P. W. 54; *Ostrom v. Palmer*, 3 A. R. 61; *Coote on Mort.*, 4th ed., p. 330; *Jones v. Morgan*, 1 Bro. C. C. 206; *Poole v. Poole*, 3 B. & P. 620.

J. MacLennan, Q.C., and A. Hoskin, Q.C., for the defendants, contended that William only took an estate for life in the lands under the direct devise to him, and cited *Byth. Prac. of Con.*, 3rd ed., vol. 2, p. 829; *Hayes's Concise Conv.*, 3rd ed., p. 597; *Jarm. on Wills*, 4th ed., vol. 2, p. 384;

Carsham v. Falcon, 2 Scott 105; *Doe dem. Woodall v. Woodall*, 3 C. B. 349; *Meredith v. Meredith*, 10 East. 503; *Jarm. on Wills*, 4th ed., vol. 1, p. 746; *Doughty v. Saltwell*, 15 Sim. 640.

B. B. Osler, in reply, cited *Mellish v. Mellish*, 2 B. & C. 520; *Jarm on Wills*, 4th ed., vol. 2, p. 402; *Bowen v. Lewis*, L. R. 9 App. Cas. 890.

March 4th, 1885. BOYD, C.—So far as the share of the property devised to Amasa is concerned, I think the will became inoperative as to it on account of Amasa predeceasing the testator. The whole scope of that clause intends that Amasa shall survive the testator, and its provisions all point in this direction, as was commented upon during the argument. The defendant William McIntosh then takes one-third in fee of this share as upon an intestacy, subject to the lien of his brother Robert thereupon (a).

Upon the other part of the will containing a direct devise to the defendant William, the question was debated whether he had merely a life estate, or was tenant in tail. It was conceded that if the latter, then the series of transactions in evidence relating to this property had the effect of barring the entail. The will is hardly to be distinguished in the turn of its phraseology from the will in *Parker v. Tootal*, 11 H. L. C. 143, and it is governed by the decision in that case. After the life estate to William, the will gives the land to the first and all and every the son and sons of the body of William in tail male one after the other as they shall severally be in point of birth, the elder of such sons and the heirs male of his body to be preferred and to take before the younger of such sons, &c. There is a life estate at first and only in W. McIntosh, with remainder in tail male to his first and other sons successively, according to priority of birth, and failing male issue, a further remainder to his daughters. Circumstances might arise in which William would have an estate

(a) It appeared that Robert McIntosh was holder of a mortgage created on this portion of the property.

in tail by way of remainder after the intermediate limitations to his first and succeeding sons, but he could not so deal with that ultimate remainder as to divest the right of his first and other sons to take as purchasers. *Goodtitle dem. Sweet v. Herring*, 1 East. 264, is also very much in point as to there being only a life estate devised to the defendant W. McIntosh in this case. Such will be my decision.

No argument was addressed to the subject of costs. The questions were brought before me for argument by arrangement, and I suppose the parties have provided for the disposition of the costs according as my judgment should be upon the merits.

A. H. F. L.

J. K. Galbraith, solicitor for the plaintiff.

McMichael, Hoskin, and Ogden, solicitors for the defendants.

[CHANCERY DIVISION.]

MALOTT v. THE CORPORATION OF THE TOWNSHIP OF
MERSEA.

*Municipal corporation—Drainage—Injury to lands in adjoining township—
Right of action—Injunction—Injury from increased velocity of water—
Arbitration under Municipal Act—46 Vic. c. 18 (O.), secs. 590, 591.*

When M. brought action for an injunction against a municipal corporation for that by reason of certain drainage works constructed by them the defendants had caused an increased quantity of water to flow into a creek running through his lands which were situate in an adjoining township, and which had consequently been flooded and damaged, partly from the access of water sent into the creek, and partly from the increased velocity imparted to the flow of water into the creek.

Held, that M. was entitled to an injunction restraining the increased flow of water into the creek, and also the increased velocity, and to a reference as to damages, and that he was not bound to proceed by way of arbitration under 46 Vic. c. 18, (O.) secs. 590, 591, but was at liberty to seek relief in the ordinary way by action.

Held, also, that the fact that the by-law under which the said drainage work was done had not been quashed, did not prevent the plaintiff from bringing this action.

THIS was an action brought by J. W. Malott against the Corporation of the township of Mersea, alleging that he was the owner of certain lands in the township of Romney: that a water-course known as Two Creeks ran through the said lands: that the lands lay adjacent to the town line between the township of Mersea and Romney: that in 1880, the defendants constructed certain drains, the result of which was that, whereas before the opening of such drains, the channel of the Two Creeks when cleared out, widened, deepened, and straightened by the plaintiff, as it had been, was sufficient to carry off all the flood waters naturally flowing into the same, upon the completion of the said drains by the defendants, a great volume of water was thereby turned from its natural flow along the same into Two Creeks, and over-flowed the channel of the same, washed away his fences, destroyed his crops, injured his lands and put him to great expense and damage: and the plaintiff claimed damages, and an injunction restraining the defendant from continuing the wrongful acts complained of, and general relief.

The action came on for trial at Chatham, on June 15th, 16th and 17th, 1885, before Ferguson, J.

C. R. Atkinson and Christie, for the plaintiff, cited *Northwood v. The Corporation of the Township of Raleigh*, 3 O. R. 347.

W. Douglas and J. A. Walker, for the defendants. The plaintiff has mistaken his remedy, and should have proceeded under 46 Vic. ch. 18, sec. 591, (O). Moreover the by-law under which work complained of was done, has never been set aside or quashed, and for this reason he cannot sustain this action. He has, however, failed to prove his case on the evidence. Besides, the case is not one for an injunction, but if there is any case at all, it is one for compensation. We refer to *Pearson v. Skelton*, 1 M. & W. 504; *Harr. Mun. Act*, 4th ed., pp. 248, 294, 295, 556; R. S. O. ch. 174, secs. 543, sub-s. 2, 545, 546; 44 Vic. ch. 24, sec. 22 (O); 46 Vic. ch. 18, (O) secs. 570, sub-s. 16, 576, 586, 591; *Van Egmond v. The Corporation of the Town of Seaforth*, 6 O. R. 599; *Re Dover East and West and Chatham*, 5 O. R. 325; *The Vestry of the Parish of St. Pancras v. Batterbury*, 2 C. B. N. S. 477; *Dillon on Mun. Corp.*, 3rd. ed. sec. 1051; *Kerr on Injunctions*, 2nd ed., p. 176; *Lawrence v. The Great Northern R. W. Co.*, 16 Q. B. 643; *Law v. The Corporation of the Town of Niagara Falls*, 6 O. R. 467; *Bellamy v. The City of Hamilton*, 4 C. P. 526.

Atkinson, in reply, cited *Smith v. The Corporation of the Township of Raleigh*, 3 O. R. 405.

July 4th, 1885. FERGUSON, J.—[After expressing his opinion that on the facts shewn by the evidence, the plaintiff was entitled to relief against the defendants.] It was, however, contended for the defence that the plaintiff's remedy, if any he had, was under the provisions of section 22 of 44 Vic. ch. 24, (O) which was a new section instead of section 544 of the then Municipal Act, R. S. O. ch. 174, and brought into the Municipal Institutions Act of 1883, 46 Vic. ch. 18, (O) as section 590, and section 545 of

R. S. O. ch. 174, now section 591 of the Municipal Institutions Act of 1883, and that the plaintiff, in case he has any right, should have proceeded under the provisions of these enactments and not by action in this Court.

I am unable to see how the plaintiff could, under the provisions of these enactments, avail himself of any adequate remedy for the wrong which has, I think, been inflicted upon him. I think much that is said in the case *Northwood v. The Corporation of the Township of Raleigh*, 3 O. R. 347, applies to the case, and I am of the opinion that these enactments do not, nor does any legislation of which I am aware, preclude the defendants from seeking relief in this Court in the ordinary way by action.

It was also contended that the plaintiff could not sustain the action because the by-law under which the work was done, had not been set aside or quashed, but I think this contention cannot succeed.

I am of the opinion that the plaintiff is entitled to an order for an injunction restraining the defendants from permitting more water to flow down the Dale drain into the ravine, and hence into Two Creeks than flowed in the same drain before the extension and deepening aforesaid, and from permitting the water to flow into Two Creeks with any greater velocity than that with which it flowed before the said extension and deepening (a).

(a) It appeared that the evils complained of by the plaintiff arose out of the cleaning out, deepening, and widening by the defendants of a certain drain known as the Dale drain. This drain was constructed some 21 years before this action. It emptied into a ravine, which ran into Two Creeks. It was in 1881 that this drain was cleaned out and deepened, and this cleaning out and deepening was extended down to Two Creeks. The by-law under which the defendants acted in 1881, was passed on October 18th, 1880. The learned Judge found as a fact that a larger quantity of water was delivered by the Dale drain into Two Creeks since the extension and deepening in 1881 than before that time; and that some of the water was drawn from lands further westward than any lands from which water was drawn before the said extension and deepening: and that the quantity of water delivered into Two Creeks by the Dale drain in excess of what it did so deliver before the extension and deepening of it aforesaid, was so large a quantity as to materially increase the quantity that.

I am of the opinion that the plaintiff is entitled to a reference to the Master at Chatham, to ascertain the amount of the damages that he has sustained by reason of the excess of flooding to his land occasioned by the excess of water sent down by the Dale drain by means or by reason of the extension and deepening aforesaid, taking into account the difference of the velocity with which the water is delivered into the ravine and hence into Two Creeks, and to an order against the defendants for the payment of the sum so ascertained by the Master; and I think the plaintiff entitled to the costs of this action, to be paid by the defendants immediately after the taxation thereof by the Master at Chatham. The plaintiff is also, I think, entitled to the costs of the reference, to be taxed and paid with the damages.

The damages to be ascertained in favour of the plaintiff will, of course, be only those damages that he has sustained since the settlement with him by the defendants mentioned at the trial and in the evidence.

I think the order, so far as it relates to the injunction, should not issue for the period of say one year, so that the defendants may have ample time to make provision for properly taking care of the water in question and removing the cause of the difficulty; but this is to be without prejudice to the plaintiff taking any proceedings for the recovery of any damages that he may in the meantime sustain.

Judgment accordingly.

The defendants afterwards moved by way of appeal to the Divisional Court.

would otherwise at times of freshets flow down Two Creeks into and upon the plaintiff's lands, and materially increase the flooding there to the increased injury of the plaintiff's lands and crops. He also expressed his opinion that the increased velocity of the water in the Dale drain since the extension and deepening of it aforesaid, would much increase the flooding on the plaintiff's land above what it would otherwise have been even if the quantity actually brought down during any one freshet were not greater than before.

The motion was argued on September 8th and 9th, 1885, before Boyd, C., and Proudfoot, J.

W. Douglas, for the defendants.

C. R. Atkinson, for the plaintiff.

Besides the enactments and authorities cited below, *McGarvey v. The Corporation of the Town of Strathroy*, 10 A. R. 631, was cited by the counsel for the defendants.

The Court dismissed the motion and affirmed the judgment, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

BEARD ET AL. V. CREDIT VALLEY RAILWAY COMPANY.

Railways—Six months limitation—R. S. O. ch. 165, sec. 34—Plaintiff abandoning action—Costs of third party.

Held, that sec. 34 of R. S. O. ch. 165, which fixes a limitation of six months for bringing actions for any damage or injury sustained by reason of any railway, did not apply to an action brought against a railway company for damages for wrongfully taking earth from off the plaintiffs' land.

The Corporation of the Township of Brock v. The Toronto and Nipissing R. W. Co., 37 U. C. R. 372, followed.

Where the plaintiffs brought action against the defendants to recover possession of certain lands, and the latter resisted the claim, and also served a third party notice upon H., claiming indemnity; and, thereupon, by order in Chambers, on the application of the defendants, H. was made a party defendant to the action, and the plaintiffs afterwards abandoned their claim to the lands.

Held, that the plaintiffs must pay H.'s costs.

THIS was an action brought by Charles L. Beard and John Barwick, trustees of Robert Newton Light, against the Credit Valley Railway Company to recover possession of certain lands in the Gore of West Oxford, alleged to have been wrongfully taken by the railway company for the purpose of constructing a certain branch line, and to recover damages of and incidental to the taking of such lands, and also damages for excavating, digging up, and carrying away the soil from certain other of the plaintiffs' lands.

The land so alleged to have been wrongfully taken possession of by the defendants, and which formed the chief element of the plaintiffs' claim, was a part of what was called Queen street on a registered plan of the plaintiffs' land, which plan however the plaintiffs contended had been legally superseded by one subsequently registered, whereby they alleged they had legally closed up said street, so that the said street never became and was not a public road. In respect of the claim of the plaintiffs as to this portion of the lands in question the defendants justified under a by-law of the municipality of West Oxford, and also

served a third party notice upon James Hay, the elder, and James Hay, the younger, claiming a right to be indemnified by them in respect thereof, upon certain grounds not necessary further to specify here, and the Hays were, on the application of the defendants, by order in Chambers of September 16th, 1884, given liberty to appear and deliver a defence against the plaintiffs' claim, which they did.

The plaintiffs also claimed that the defendants, the railway company, had taken the earth as aforesaid from a piece of land 46 or 50 feet from the line of the siding in question, being about 15 feet by about 30 feet; and also from what were called in the evidence lots 31, 32, and 33.

Amongst other defences the company claimed the benefit of section 34 of the Railway Act of Ontario, R. S. O. ch. 165, which fixes a limitation of six months for bringing actions for any damage or injury sustained "by reason of the railway."

The action was tried at Woodstock on April 21st, 1885, before Ferguson, J.

The remaining facts of the case and what took place at the trial sufficiently appear from the judgment,

W. Cassels, Q.C., and Ball, Q.C., for the plaintiffs. The six months limitation does not apply: *Slater v. The Canada Central R. W. Co.*, 25 Gr. 363; *Scanlon v. London and Port Stanley R. W. Co.*, 23 Gr. 559; *Malloch v. Grand Trunk R. W. Co.*, 6 Gr. 348; *Wing v. Tottenham and Hampstead Junction R. W. Co.*, L. R. 3 Ch. 740. As to the costs of the defendants the Hays, that is a matter between the defendants. The plaintiffs cannot be called upon to pay Hays's costs: *Taylor & Ewart's Judicature Act* p. 209; *Yorkshire Waggon Co. v. Newport Coal Co.*, 5 Q. B. D. 268. The plaintiffs have nothing to do with the third parties. Besides it does not appear that the company have any remedy over against the Hays.

C. Moss, Q.C., and *McKay*, for the Hays. These defendants have a right to their costs against the plaintiffs under our practice. When a third party does appear and dispute the plaintiff's claim, he is entitled to his costs against the plaintiff if he succeeds: *O. J. A. Marg. Rules* 108, 111; *MacLennan's Jud. Act*, 2nd ed. p. 263, *seq.*; *Witham v. Vane*, 28 W. R. 276, 41 L. T. 729.

G. T. Blackstock, for the railway company. At any rate the Hays can have no right to costs against the company. The six months limitation protects the company: *Kelly v. The Ottawa Street R. W. Co.*, 3 A. R. 616; *Vanhorn v. The Grand Trunk R. W. Co.*, 18 U. C. R. 356. I also refer to R. S. O. ch. 165, sec. 9, sub-sec. 5.

W. Cassels, Q.C., in reply cited *Dumble v. The Cobourg and Peterborough R. W. Co.*, 29 Gr. 121.

May 11th, 1885. FERGUSON, J.—During the trial and after the greater part of the evidence had been given, the plaintiffs' counsel said that he would not on behalf of the plaintiffs contend that the street called Queen street could have been properly closed by the plaintiffs or any of them. This disposed of the most important part of the case in the defendants favour, and it need not be further discussed as the plaintiffs said that they would not claim title to the lands embraced in this street as against either of the defendants.

The remaining parts of the suit are as it appears to me of comparatively trifling importance. These are:

1. Has it been proved that the defendants, the railway company, took the earth from the piece of ground mentioned in the evidence as a piece of land lying about 40 or 50 feet from the line of the siding in question and being about 15 feet by about 30 feet?

2. Does the six months limitations clause apply to the act of taking the earth from lots 31, 32, and 33, mentioned in the evidence, and to the taking of the earth from this 15 feet by 30 feet, if it is considered that the evidence shews that this last was done by the railway company? and,

3. The matter of the costs of the action as between the plaintiffs and the defendants, the railway company, and the defendants the Hays.

As to the first question it was not proved that the defendants, the railway company, took the earth from this piece of land about 15 feet by about 30 feet, by any person who saw these defendants or their servants, or agents, or workmen doing the act. But as the circumstances indicated that it was very probable they did do so, and as the matter was not considered (apparently) a very important one in the suit and the evidence perhaps not so carefully prepared as otherwise it might have been, I do not think I shall be doing wrong by permitting the plaintiffs to give further evidence on this subject in case of a reference on the other subject. If no such reference takes place the finding must, I think, be for the defendants on this part of the case. This may not be considered good practice but I think I may venture to take this course as it appears to me to be the just one in this case.

As to the second question, that is, as to whether or not the six months limitation applies, it was said at the bar that the precise point had not been decided. I, however, venture to think that the case *The Corporation of the Township of Brock v. The Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372, is in point and in favour of the plaintiffs' contention. True, there were in that case letters between the parties on the subject in which the then defendants acknowledged that they were in the wrong in taking the gravel, and certain offers were made. These do not appear in this case. The facts are, however, now (it may be said) undisputed facts. The defendants, the railway company, did not take or profess an intention of taking the land (lots 31, 32, and 33) or any part of it. They simply took the material that they found there and used it for the purposes of their road, (embankments, I suppose) and I think the principles stated in the case I refer to, by the then Chief Justice Richards, and adopted by the then Court of Queen's Bench, of direct application

here, and following that case, I am of opinion that the six months limitation does not apply.

There will be a reference to the Master at Woodstock as to the damages occasioned to the plaintiffs by the removal of the earth or other material from these lots 31, 32, and 33, by the defendants, the railway company, with leave to the plaintiffs to give evidence as to the alleged removal of the material from the piece of land known in the case as the piece about 15 feet by about 30 feet, and should the Master find this act was done by the defendants, the railway company, then to ascertain and state also the damages occasioned to the plaintiffs thereby.

As to the costs. The plaintiffs have certainly failed as against the defendants, the Hays, and after looking at the cases referred to by counsel I am of the opinion that the plaintiffs should pay the costs of these defendants (the Hays). These defendants need not I apprehend be parties to the reference.

The plaintiffs failed also as against the defendants, the railway company, in respect of what appeared to me to be by far the most important part of the suit. They have, however, succeeded in shewing that they are, as I think, entitled to the measure of relief above stated. As between the plaintiffs and the defendants, the railway company, I think I shall not be wrong in saying that there should be no costs down to and inclusive of the trial.

The plaintiffs are to elect within one month as to whether or not they will take the reference offered, and if they so elect further directions and subsequent costs will be reserved. If they elect not to take the reference, the action as between them and the defendants, the railway company, will be dismissed, without costs. The defendants, the railway company, did not insist upon damages being ascertained under the provisions of the Railway Act or any of them even if they had the right so to insist.

A. H. F. L.

[COMMON PLEAS DIVISION.]

THE HAMILTON AND FLAMBOROUGH ROAD COMPANY V.
BINKLEY.

SPECIAL CASE.

*Road company—Power to exempt from payment of tolls—Ultra vires—
Bridge—Location of road—Lapse of time.*

By agreement made in the year 1869, between a road company and the city of Hamilton, the Road Company were to extend their road from a point near the Desjardins Canal into the limits of the city, and as part of such road should build a bridge over the canal, the city to lend the road company \$5,000 for ten years at the nominal rate of interest of one per cent.; and a by-law was passed by the city to give effect to the agreement, the by-law containing a proviso that no toll should be exacted from any parties residing upon or owning property within the limits of the city on passing over said bridge. The road was subsequently extended into Hamilton, and a toll gate erected within the city limits. Litigation afterwards arose between the road company and the city, the Great Western Railway Company, and the Desjardins Canal Company, as to the erection of the Bridge which was continued until 1874, when a settlement was effected by its being agreed by all parties that a fixed stationery bridge should be erected and maintained by the road company free from any toll thereon, which was legalized by 37 Vic. ch. 73. (O). The defendant passing through the said toll-gate refused to pay toll, on the ground that the by-law was *ultra vires*.

Held, that the proviso in the by-law was not *ultra vires*, for the road company could agree not to exact tolls from any person or body of persons, as there was nothing in the Act of incorporation which prevented their doing so: that the city of Hamilton had paid a substantial sum for the privilege; and there was no discrimination as regarded the residents thereof; and that the proviso only applied to the non-exaction of tolls on the bridge, and had nothing to do with the road, and was legalized by the 37 Vic. ch. 73, (O).

Held, also, that an objection that the location of the road had not been made prior to the passing of the by-law was not tenable after the road had been located and in use for more than fifteen years.

THIS action was brought to recover from the defendant the sum of \$10 for tolls alleged to be due by him to the plaintiffs for the use of their road; and by the consent of parties, and by an order in that behalf, a case was stated for the opinion of the Court, without any pleadings.

The special case set up that the Hamilton and Brock Road Company were duly incorporated on the 5th December, 1853, under 16 Vic. ch. 190, "for the purpose of constructing a plank, macadamized, or gravelled road from

the 'Upper Burlington Bridge,' to what had been known as 'Freel's Tavern,' on the Brock Road, between the townships of East and West Flamborough."

On the 9th of December, 1867, the Hamilton and Brock Road Company amalgamated with a company owning a road known as "the Hamilton, Waterdown, and Carlisle Road," and the joint companies were thenceforth known as "the Hamilton and Milton Road Company."

On the 7th June, 1869, the corporation of the city of Hamilton passed their by-law, numbered 7, whereby they enacted:

"Whereas, the Hamilton and Milton Road Company propose to continue and extend their toll roads, &c., from points at or near the present termini, southerly into the city of Hamilton, as far as the easterly limit of what is commonly known as the Ordnance lands on Burlington Heights; and it is advisable to permit and allow them to do so, and to pass a by-law for that purpose.

"That the said the Hamilton and Milton Road Company be and they are hereby permitted and allowed to continue and extend both their said toll roads from such points as the said Company may select at or near the easterly termini of said respective roads southerly into the City of Hamilton as far as the easterly limit of what is commonly known as the Ordnance lands on Burlington Heights aforesaid.

"Provided always, that no toll shall be exacted from any parties residing on or owning property lying beyond the southerly end of the road and within the limits of the City in passing over the said Bridge, either to or from their said property.

"And whereas the Hamilton and Milton Road Company, in improving the approach to the City of Hamilton at the westerly end, propose to construct a good and commodious bridge over the Desjardins Canal at Burlington Heights, in the said City, and as a help and inducement thereto the said City have agreed to pay over and advance to them, by way of loan for the period of ten years, the sum of \$5,000 on the terms and to be secured as hereinafter mentioned.

"Therefore be it enacted by the Corporation of the City of Hamilton, that the said sum of \$5,000 shall be loaned to the said the Hamilton and Milton Road Company for the period of ten years, upon interest at the rate of one per cent. per annum; the said loan to be secured on the roads, tolls and works of the said Road Company; and the said money shall be paid over and advanced to the said road company, as follows, that is to say, one-half thereof so soon as a good bridge, according to certain plans and specifications which have been submitted to this council, shall be put across the said Canal, and the necessary approaches thereto on both sides made, and in such a state of completeness as to be fit to be used for

public travel; and the other half so soon as the said Road Company shall have completed, in accordance with said plans and specifications, the said continuations and extensions of their said roads, each portion or half of said loan to be secured when paid over by mortgage on the roads, tolls and works of the said Road Company, payable within ten years from their respective dates, with interest at the rate of one per cent. per annum, payable yearly,—said mortgage to be to the satisfaction of the City Solicitor, and to be subject only to the mortgages at present existing, on which the amount represented to be due is in the aggregate the sum of \$2,000.”

The agreement was then set out, the terms of which are embodied in the by-law, except that no mention is made of the exception contained in the by-law. The agreement is said to be dated 22nd June, 1869, and provided for the passing of the by-law.

After the passing of the by-law No. 7, the Hamilton and Milton Road Company duly passed a resolution to extend their road into the city of Hamilton.

In consequence of a misunderstanding between the road company and the City Board of Works a further or supplementary agreement, dated the 13th January, 1870, was entered into between the road company and the city, whereby the location of the extension of the road was changed to the southerly side of the heights instead of passing over them.

In the years 1869, 1870, 1871, such extension was constructed and completed, the road company purchasing the land therefor.

On the 2nd January, 1879, the plaintiffs, being a company duly incorporated under R. S. O. ch. 152, purchased from the Hamilton and Milton Road Company their road works and franchises.

The plaintiffs' toll-gate being the only one on their “Town-line or Brock Road” branch, which was six miles in length, was situate on their extension in the city of Hamilton, being the gate through which the defendant passed when travelling over the said road.

The plaintiffs' claim is for tolls due and payable for passing and re-passing over the said road and through the

said toll-gate, amounting to the sum of \$10, which was duly demanded from the defendant.

The defendant disputes the right of the plaintiffs to charge or demand toll of him for passing through the said gate erected within the corporate limits of the city of Hamilton, on the ground that the said By-law No. 7 is *ultra vires* of the corporation of the city of Hamilton.

The question for the opinion of the Court is :

Whether the company is entitled to demand toll at the said gate, the same being within the limits of the city of Hamilton ?

Should the Court be opinion that the defendant is liable to pay toll at the said gate, then judgment is to be for the plaintiffs for \$10, with costs of suit.

But if the Court should be of opinion that the defendant was not liable to pay toll at the said gate, under the circumstances stated, then judgment of *nolle prosequi* to be entered up for the defendant, with costs of defence.

On January 30, 1885, the case was argued.

Lash, Q. C., for the plaintiffs.

Sadleir, for the defendant.

February 18, 1885. ROSE, J.—Mr. Sadleir relied on the grounds taken by the learned Judge of the county of Wentworth to support his position that the company is not entitled to demand toll at their gate (a).

Counsel admitted the title of the road company; and the only question submitted for my opinion is the validity of the by-law.

The learned Judge held the by-law invalid, on the grounds :

1. That the proviso following the clause granting permission to enter the city was *ultra vires* being unreason-

(a) This was a case of *Hopkins v. Hamilton and Flamborough Road Co.*, in which the learned County Court Judge quashed a conviction for passing through the toll gate in question without paying toll.

able, unjust, and discriminating in favour of a class, and being a proviso, formed part of the clause which it followed rendering the whole clause *ultra vires*.

2. That the by-law is invalid for uncertainty, the location of the road-way not having been made prior to the passing of the by-law.

The proviso is in the following words: "Provided always, that no toll shall be exacted from any parties residing on or owning property lying beyond the southerly end of the road and within the limits of the city in passing over the said bridge either to or from their said property."

It is manifest this exempted all persons residing upon or owning property in Hamilton from paying toll, as such persons in passing over the bridge would be passing either to or from their said property. It is also clear that the exemption was only from paying toll in passing over the bridge, and had nothing to do with the toll charged for passing over the road.

The Joint Stock Road Company's Act, C. S. U. C. ch. 49, R. S. O. ch. 152, provides for collection of tolls from persons passing over the road, a schedule of rates being given by sec. 84 of ch. 152. And by sec. 87 it is further provided that with the consent of the council of the county a higher rate may be charged at any toll gate erected at any bridge &c.

It does not appear from the case stated whether any toll gate was ever erected or intended to be erected at this bridge. It is clear, however, that while the council of the city of Hamilton were willing to give their consent to the road entering the city without claiming any exemption from paying the ordinary tolls, they were not content to be charged an extra toll for passing over the bridge.

The agreement, set out in the case—the date of which is subsequent to that of the by-law, an evident error, as it provides for passing the by-law—makes no reference to the exemption. If the company had no intention of charging toll for passing over the bridge, it is not difficult to understand why objection was not taken to the proviso in the

by-law. This is, however, mere conjecture, as no explanation can be found in the case.

Mr. Lash contended that this proviso was misplaced : that its proper position was after the clause providing for the loan of the \$5,000; and relied on the fact that the bridge is not referred to in the clause giving the consent, while the proviso contains the words, "*said* bridge."

I say nothing as to this contention, as I find other ground upon which to rest my opinion.

Whatever the intention of the road company might have been in 1869, when the agreement and by-law above referred to were obtained, we find that in February, 1874 by agreement entered into between the town of Dundas, the Road Company, the Great Western Railway Company, and the Desjardins Canal Company, the Road Company undertook to construct a stationary bridge over the canal and maintain the same for all time, "for all Her Majesty's liege subjects, and others, their horses and carriages, free of toll at all times thereupon and thereby safely to pass and repass."

This agreement may be found in a schedule to 37 Vic. ch. 73, (O.), by sec. 4 of which it is declared "valid, binding, and effectual to all intents and purposes."

It seems clear that since February, 1874, no toll could be collected from any one for passing over the bridge.

It appears clear, both from reason and authority, that the company could agree not to charge toll to any person or body of persons, unless something in the Act of incorporation prevented such discrimination.

The statute prohibits charging more than the rates named in the statute, and such rate may be charged to all passing over the road, and no one could complain. How, then, could complaint be made by any one charged not more than such rate, because the company chose not to charge another person? He suffers no wrong—the company lessens its receipts.

The case of the *Hungerford Market Co. v. City Steamboat Co. (Limited)*, 3 E. & E. p. 365, cited by Mr.

Lash, is directly in point. The head note states: "A company empowered by statute to take tolls in return for a public service is not bound, independently of express enactment, to exact the same tolls from all persons alike; but is at liberty to remit the tolls, or any portion of them, to particular persons, at its pleasure and discretion."

In giving judgment Cockburn, C. J., says, at p. 381: "Yet authority would certainly seem to be required to establish a proposition directly at variance with the well-known axiom that every one is at liberty to renounce a right established in his favour. The power to take the tolls is conferred on the company in consideration of service to be rendered, and accommodation to be afforded, to the public. If the service be rendered and the accommodation afforded, the obligation of the company is fulfilled. If it omit to exact the toll which is the consideration for the service, the shareholders would seem to be the only persons who can have the right to complain."

It concludes as follows, at p. 382: "The result then is, that in our opinion there neither arises upon these Acts of Parliament nor exists at common law any obligation on this company to exact uniform tolls, provided they keep within the amount fixed and appointed conformably to statute 11 Geo. IV. ch. 70."

Reference to the by-law shews, moreover, that the city was not obtaining this exemption without a return. Not only was the right to enter granted, but a loan was made of \$5,000, at a nominal interest of 1 per cent. per annum, to enable the company to build the bridge. It would appear that the interest saved to the company on this loan, repayable not before the expiration of ten years, was a very substantial sum paid by the taxpayers of Hamilton for this privilege. The shareholders of the company, I would judge, were not the losers by the bargain. If money were worth 6 per cent., there would be a saving of interest in the ten years of \$2,500.

Bearing the foregoing facts in mind, it will appear that all those residing, or owning property, in Hamilton were

by this by-law treated alike, no one having granted to him any privilege over the others, as all were exempted from this bridge toll : that no one resident out of Hamilton had the right to complain as against the company : that no one outside of Hamilton was subjected by this by-law to the payment of any higher rate than by law could otherwise be imposed : that it does not appear that the company ever had the right to charge toll for passing over the bridge, and that since February, 1874, nearly eleven years, had precluded themselves from ever demanding such tolls : then what excuse does the presence of this proviso in the by-law in 1869 afford for the non-payment of toll for passing over the road in 1884 ?

Authorities have been referred to shewing that by-laws must not discriminate or be unjust. With the greatest respect, I am unable to see how such cases apply to the facts as above stated. If the by-law provided that certain residents in Hamilton, say those on the main street, should be exempted from payment of toll, I can quite understand that others residing on other streets might complain of discrimination and injustice.

If a by-law were passed imposing upon a certain class of persons coming to Hamilton to trade, a tax or burden from which all others were exempted, it would not be difficult to discover discrimination. Such a case is *Regina v. Pipe*, 1 O. R. 43.

Here, however, a private corporation, having the right to charge all persons a toll not exceeding a rate fixed by statute, agrees for a valuable consideration not to charge certain persons, all within a certain municipality, and thus diminish their own revenue to the detriment of no person save the shareholders, and upon such an agreement the municipality grant a privilege. How can a by-law granting the privilege, and providing for carrying out the agreement, be said to be unjust ? Unjust to whom ? Not to anyone within the municipality, for all are treated alike. Not to anyone without the municipality, for no greater burden is imposed upon them. Not to the company, for they both give and receive.

Had I thought the clause an objectionable one, I would have had much difficulty in seeing my way to hold that ten years after the Act of 1874 the objection could be urged, the company having incurred heavy liabilities and made large expenditures on the faith of such consent to enter the city.

I have not overlooked the case of *Yorkville and Vaughan Plank Road Co. v. Baldwin*, 20 C. P. 312. The present learned Chief Justice of Ontario, then presiding in that Court, evidently was not, on the facts in that case, able to join Mr. Justice Gwynne in his opinion, so that such opinion did not form a basis of the judgment of the Court.

Moreover, the facts were so different that I do not feel pressed to express any further opinion than may be drawn from the views I have above stated.

The second ground of objection to the by-law, however valid it might have been on a motion to quash prior to the construction of the road, seems to me not valid after the road has been located for about fifteen years. I think it may now be assumed that all parties understood within reasonable limits where the road was to run, and that it has been run where all parties intended it should be. I do not see how such an objection can be heard at the instance of the defendant.

In the view I have taken it has become unnecessary for me to consider the other grounds taken by Mr. Lash. I will however state them.

1. That the Act, 37 Vic. ch. 73 (O.), is a statutory recognition of the roadway within the city.

2. That the corporation could not maintain ejectment against the company, after this lapse of time, and would be bound by acquiescence, citing *Corporation of Welland v. Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147, and in appeal, 31 U. C. R. 539; *Corporation of Pembroke v. Canada Central R. W. Co.*, 3 O. R. 503; *McDougall v. Lindsay Paper Mill Co.*, 10 P. R. 247, 252; *Phosphate Lime Co. v. Green*, L. R. 7 C. P. 43; *Grady's Case*, 1 DeG. J. & S. 488; *Desjardins Canal Co. v. Great Western R. W. Co.*, 27 U. C. R. 363.

That the defendant has no *locus standi*, citing *Greenstreet v. Paris*, 21 Gr. 234; *Ware v. Regent Canal Co.*, 3 DeG. & J. 212, 228; *Evan v. Corporation of Avon*, 29 Beav. 144.

The result of my opinion is, that pursuant to the agreement in the case, judgment will be entered for the plaintiffs for \$10, and costs of the suit.

[CHANCERY DIVISION.]

THE BANK OF HAMILTON V. THE JOHN T. NOYE
MANUFACTURING COMPANY.

Warehouse receipts—Validity of—Banking Act—Negotiation of note—Commingling of property—Tracing property covered by receipts—Affidavit evidence.

T. a miller gave warehouse receipts for wheat to the plaintiffs attached to notes made by him, payable to their order to take up his overdue notes which were secured by like receipts. The receipts were in the following form: "Received in store in my warehouse or mill from farmers, 2,000 bushels of wheat, to be delivered to the order of myself, to be endorsed hereon. This is to be regarded as a receipt under the provisions of Statute 43 Vic. ch. 22. The said wheat is separate from and will be kept separate and distinguishable from other grain." The receipts were endorsed in blank. T. did not keep the wheat covered by the receipts distinct, but ground some of it into flour and allowed the remainder to be mixed with wheat subsequently brought in by farmers and others. Before assigning in trust for creditors, he pointed out to the plaintiffs one carload of flour made from the wheat covered by the receipts, and admitted that the wheat and flour in his mill was covered by the receipts, and the next day the bank took possession. The evidence showed that there was about the same quantity of wheat and flour in and about the mill at the date of the last receipt as there was in dispute in this interpleader. T. subsequently assigned, and the defendants afterwards recovered a judgment against him. In an interpleader action to try the right of the bank under their warehouse receipts as against the defendants under their execution.

Held, that a special indorsement of the receipts to the plaintiffs was not essential, and that the endorsement in blank of the receipts satisfied all the requirements of the Banking Act, that Act not specifying any particular mode in which the property in the receipt is to be transferred, and that the notes and receipts attached might be read together.

Held, also, that the mode of acquiring the receipts, viz., by delivering up the overdue notes with receipts, was unobjectionable, the transaction being in fact a negotiation of the notes by the surrender of the antecedent lien upon the wheat of T.; or at any rate there was a mere substitution or continuation of securities according to the original understanding of the parties.

Held, also, that T. having undertaken to keep "the grain separate and distinguishable from other grain," and having failed to do so, it became his duty to enable the plaintiffs to recover what the receipts called for or its equivalent, and having done this while able to dispose of his property, the warehouse receipts attached upon the property so indicated by him, and the plaintiffs were entitled to succeed against the execution creditors.

THIS was an interpleader issue between the Bank of Hamilton and The John T. Noye Manufacturing Company, to try the right to certain wheat and flour manufactured

from wheat which the plaintiffs alleged was covered by warehouse receipts held by them, and which had been seized by the sheriff under an execution at the suit of the defendants.

The facts are set out in the judgment.

The issue was tried at the Spring sittings, held at Guelph on April 8th, 1885, before Boyd, C.

Guthrie, Q. C., for the plaintiffs. 43 Vic. ch. 22 (D.), is the Act that at present governs warehouse receipts. The property in the wheat passed to the plaintiffs; *Smith v. Merchants Bank*, 8 S. C. R. 529, 542; *Merchants Bank v. Hancock*, 6 O. R. 285. The plaintiffs had a perfect title as against Tolton to the wheat and its products, when they took possession. Tolton could not have resisted their demand, nor could any one else be in a better position than he was: *Smith v. Merchants Bank*, 28 Gr. 629; *In re Coleman*, 36 U. C. R. 577, 586, 588; *Box v. Provincial Ins. Co.* 18 Gr. 284, 287; *The Royal Canadian Bank v. Ross*, 40 U. C. R. 466; *Great Western R. W. Co. v. Hodgson*, 44 U. C. R. 187; *Coffey v. The Quebec Bank*, 20 C. P. 117. A man may be his own warehouseman. 43 Vic. ch. 22, sec. 47, (D.), permits this in the case of a miller. Sec. 7 defines warehouse receipts. It can be given for other than a present advance; sec. 46, "for payment of any debt incurred in the bank's business." The words "bill negotiated," mean to sell or transfer for value a bill of exchange or promissory note. The act permits a renewal of the note. The old act did not. This transaction is in the nature of a present advance since the former security was given up. The bank gave up the wheat they held under the former warehouse receipt: 31 Vic. ch. 11, sec. 8, (D.), *Bank of British North America v. Clarkson*, 19 C. P. 182; *Royal Canadian Bank v. Miller*, 29 U. C. R. 266. The evidence shews that Tolton admitted that the wheat and its products were covered by the warehouse receipts.

Moss, Q. C., and Cutten, for the defendants. The warehouse receipts give no title whatever; the language is peculiar. It is only "from farmers." The indorsement is in blank, and does not pass the title to the bank. The statute does not authorize the form of receipt used in this case at all. This is not a warehouse receipt direct to the bank. It should be shewn that the property was owned by the person giving the receipt. The receipt being invalid it was not acquired by the bank for a present advance, and there was no contracting or negotiating of a debt at that time. If a note is renewed the old warehouse receipt should be held. If they give it up that act gives no right in regard to a new one. The evidence shews that when Tolton gave the receipt he was not the owner of the grain. When he gave the second receipts he had no wheat to represent any of them. The property seized by the sheriff is different from that covered by the receipts. The mill was cleared out in the middle of November, and therefore there was no intermingling because all had disappeared. Section 7 of the Banking Act applies to product of grain covered by warehouse receipts.

Guthrie, Q. C., in reply. The policy of the law is shewn in the present statute by extending the law as to warehouse receipts. By the stock-in-trade this miller was enabled to carry on his business, and our security floated to what replenished the stock in the mill. The indorsement in blank was enough: *Royal Canadian Bank v. Carruthers*, 28 U. C. R. 578.

April 22, 1885. BOYD, C.—The bank claims the wheat and flour seized by the sheriff by virtue of three warehouse receipts, dated (the first) on the 31st October, 1884, and two others on the 25th November, 1884, each covering 2,000 bushels of grain. These were given by the execution debtor Tolton, a miller, upon wheat stored in his own mill premises, and were all similarly expressed as follows :

" WAREHOUSE RECEIPT.

" Received in store in my warehouse at mill near Guelph from farmers two-thousand bushels wheat to be delivered to the order of myself to be endorsed hereon.

" This is to be regarded as a receipt under the provisions of Statute 43, Vic. ch. 22.

" The said wheat is separate from, and will be kept separate and distinguishable from other grain.

" Dated, Georgetown, 25th November, 1884.

(Signed), "Geo. P. Tolton."

To each of the receipts was attached Tolton's note for \$1,500, payable to the order of the bank, and the notes and receipts so attached were handed to the bank in order to take up overdue notes collaterally secured by like receipts on wheat made by Tolton. The first advance of money by the bank was upon a note discounted on 28th August, to which a warehouse receipt was attached, and the next advances were upon notes of the 22nd of September, to which receipts were likewise attached. The bank manager says that all the notes now held by the bank, with the receipts now in question attached, were negotiated on their respective dates by the bank, and the proceeds placed to the credit of Tolton, and contemporaneously there was delivered up to Tolton his overdue notes with the former receipts thereunto attached.

The bank manager had seen the warehouse of Tolton in July, 1884, and judged that some 5000 or 6000 bushels of wheat were then stored there. He did not see it again till early in January, 1885, when he judged there would be shortage of about 4000 bushels. Evidence was given by the defendants to shew that the wheat in the storehouse was ground into flour from time to time, and that in the middle of November, 1884, the quantity of wheat was reduced to about 200 or 300 bushels in all parts of the storehouse.

It was also in evidence that not more than 2000 bushels of wheat were in the store from the end of October till the end of November; and that the mill was grinding steadily while the wheat held out during

that time. Wheat was received from one Micklin into Tolton's warehouse from the 28th October, till the 25th November, to the extent of 1,600 bushels, and from one other source not identified, 1,050 bushels about the first of November. Smaller amounts were also being weekly received from farmers. It is objected that these larger bulks from Micklin and the others cannot be regarded, as the warehouse receipts are in respect of wheat received "from farmers." The evidence, however, would lead to the reasonable inference that there was about the same quantity of wheat and flour in and about the mill at the date of the last receipt, (25th of November) as there is now in dispute upon this interpleader.

Tolton sent out a notice calling his creditors together, and this led to the bank investigating the state of the security held by them.

It is proved that on the 8th January, Tolton said to the manager and the solicitor of the bank that he thought there was enough wheat and its product in the mill to answer the receipts. He then said that the flour in the mill was made from wheat covered by the bank's receipts. He admitted that the wheat and flour in the mill was covered by these warehouse receipts; and said further there was a car load of flour (giving its number and its position on the track) which was made out of wheat covered by the warehouse receipts; and on the next morning he pointed out the particular car to the manager and the solicitor.

The bank then took possession of the wheat and its products in the mill on the morning of the 9th January, and in the evening of that day, the assignment for the benefit of creditors was made by Tolton.

The seizure under the defendant's execution was early in February, up to which time the bank had continued their possession of the property in question, (except as to the car of flour which was in the hands of the Grand Trunk Railway, subject to the claim of the bank.)

The receipts in this case are informal, but not fatally so, as was argued by the defendants. Section 45 of the Bank

Act, according to its present scope, comprises "receipts from any person who is the keeper of any mill for goods, wares or merchandise being in the place kept by him." See section 7 of 43 Vic. ch. 22, (D.)

By section 46, "the bank may acquire and hold any warehouse receipt * * as collateral security for the payment of any debt incurred in its favour in the course of its banking business," and by a further provision in that section, it appears that the receipt may be made directly in favour of the bank. It is also therein provided that the bank shall not acquire or hold any warehouse receipt to secure the payment of any bill, note, or debt, unless such bill, note, or debt be negotiated or contracted at the time of the acquisition thereof by the bank, or upon the understanding that such warehouse receipt would be transferred to the bank, but such note or debt may be renewed, or the time for the payment thereof extended without affecting such security.

By section 47, if the person granting the receipt is engaged in the calling as his ostensible business, of miller, &c., and is at the same time the owner of the goods, &c., mentioned in the receipt, then such receipt shall be as valid and effectual as if the owner and the person making the receipt were different persons.

By section 48, there is the right to follow and hold the manufactured product of grain held under the receipt.

Here is a receipt signed by a miller respecting grain in his mill which, from his manner of dealing therewith, and from all the surroundings of the case, must be regarded as his own, although there was no very direct evidence upon that point. He grants a receipt to himself, or rather to his own order, and he completes that receipt by endorsing his name thereon in the manner usual in the blank endorsement of negotiable securities. It is objected that there is no special endorsement to the plaintiffs. That is not, in my opinion, essential, when we have such certainty in the transaction as is found here. The receipts were collateral securities for the payment of the notes attached thereto,

and these notes are all payable to the order of the Bank of Hamilton. It may be reasonably argued, (as has been successfully done in the cases of warrants and lists of lands for tax sales), that all the annexed papers form one document, and the whole is to be looked at in order to ascertain the transaction : *Church v. Fenton*, 5 S. C. R. 239.

This Banking Act does not specify any particular mode in which the property in the receipt is to be transferred to the bank ; the bank is spoken of as acquiring or holding the receipt. This manner of blank endorsement is in familiar use among mercantile men, and I think it is such a mode of transfer as satisfies all the requirements of the Act. What was said in *The Royal Canadian Bank v. Carruthers*, 28 U. C. R. 578 ; and S. C. in Appeal, 29 U. C. R. 283, as to the endorsement in blank of a bill of lading is very pertinent to other securities of the same class.

It was further objected that there was no contemporaneous advance of money by the bank at the time of the acquisition of these receipts; and reliance was placed upon the views of the Judges in *Bank of British North America v. Clarkson*, 19 C. P. 192, 196, as shewing that this transaction was merely an arrangement by which the bank obtained security for a pre-existing debt. But in that case no security was held for the original notes on which the advance was made, and it was decided under a statute 31 Vic. ch. 11, very much more limited in its provisions than the one which governs the present receipts.

The statute says the bill or note is "to be negotiated at the time of the acquisition of the receipt." According to the definition of to *negotiate*, given by Richards, J., in *Foster v. Bowes*, 2 P. R. 256, as meaning "to transfer for a valuable consideration," there was a negotiation of the notes here by the surrender of the antecedent lien of the bank upon the wheat of Tolton. Some objection was made as to the reception of evidence upon this point; if there is any serious doubt as to the tenor of these documents I would now allow them to be proved by affidavit. (See Rules 271 & 282.)

In another aspect also we have here only a substitution or a continuation of securities according to the original understanding of the parties. It was not necessary to deliver up the first receipt when a further extension of time was given and a renewal note taken for the debt—for this is practically the result of the dealing in October and November—but if it was improvidently or ignorantly handed over to the debtor, it was still competent to remedy that error by giving the present receipts according to the exposition of the statute by my predecessor in *McCrae v. Molson's Bank*, 25 Gr. 519.

As to the meaning of negotiating or discounting a security, I would also refer to the well considered judgment of my Brother Proudfoot, in *Jones v. Imperial Bank*, 23 Gr. pp. 269-272, and *Re Carew's Estate Act*, 31 Beav. 39, and *The London and Financial Association v. Kelk*, 26 Ch. D. 134.

These securities being valid in my judgment as against the objections raised, the next thing is to determine whether they attach upon the property now in litigation. If it be necessary to identify the particular grain covered by the receipts in order to the success of the bank, then that cannot be done, except to a very limited extent. But that is not necessary upon the facts of this case. Tolton, by his receipts, undertook to keep "the grain separate and distinguishable from other grain." This he failed to do, and upon him is chargeable the blame arising from commingling the plaintiff's wheat with his own. It, therefore, became Tolton's duty to give all information and aid to the bank to enable its officers to recover what the receipts called for, or its equivalent. This he did before any assignment was made, and while he was yet able to dispose of his property according to the very justice of the claim made upon him. He indicated what wheat the bank should take, and he enabled the bank to trace some of the wheat which had been converted into flour. There is not nearly enough in the whole to answer half the bank's claim, but of this property now in question, the bank took possession nearly

a month before the defendant recovered his judgment against Tolton.

I think that as against this execution the bank's claim is to be preferred. I so decide upon this interpleader issue.

The law as to confusion of chattels is to be found fully elucidated in *Lawrie v. Rathburn*, 38 U. C. R. 255, and in the judgment of Mr. Justice Strong, in *McDonald v. Lane*, 7 S. C. R. 466, and as to rights of receiptors, when the goods embraced in the documents are of an undistinguishable character such as grain or coal. See *Clark v. Western Assurance Co.*, 25 U. C. R. 217; *In re Coleman*, 36 U. C. R. 559; *The Merchants Bank of Canada v. Smith*, 8 S. C. R. 512; *Great Western R. W. Co. v. Hodgson*, 44 U. C. R. 187.

G. A. B.

[CHANCERY DIVISION.]

SMART V. SORENSON ET AL.

Dower in equity of redemption—Alienation by husband—Dower Act of 1879
—42 Vic. ch. 22 (O.)

In 1881 C. S. mortgaged certain lands to J. A., his wife M. S. joining and barring dower. In 1884 C. S. sold the lands to C., M. S. again joining in the conveyance. C. gave back a mortgage to secure payment of part of the purchase money, which mortgage was made to M. S. On a judgment creditor of C. S. seeking a declaration that M. S. held this mortgage as trustee for C. S., and for a sale and payment thereof of his judgment debt, M. S. alleged that the mortgage was made to her in consideration of her joining in the sale to C., and thus barring her right to dower.

Held, that M. S. had no such right of dower as alleged, and that there was no consideration for the making of the mortgage to C., and that she held the same as trustee for C. S.
Fleury v. Pringle, 29 Gr. 67, and *Black v. Fountain*, 23 Gr. 174, followed.

THIS was an action brought by James H. Smart against Christian Sorenson, Mary Sorenson, and H. C. T. Cottell, for the purpose of having the defendant Mary Sorenson declared a trustee in respect of a certain mortgage held by her for her husband Christian Sorenson, and for other relief, under the following circumstances.

On February 21st, 1884, the plaintiff recovered a judgment against Christian Sorenson, in an action of *Sorenson v. Smart*, reported, 5 O. R. 678, for his costs of that action, which were taxed at \$315.34, and on March 20th, 1884, he placed writs of *fi. fa.* against the goods and lands of Christian Sorenson in the hands of the sheriff of Essex, who, however, was not able to make anything on them. At the date of the judgment, Christian Sorenson owned certain lands in the county of Essex, subject to a mortgage dated December 2nd, 1881, to one John Arner, to which mortgage his wife, the defendant, Mary Sorenson, was a party for the purpose of barring her dower. On February 26th, 1884, the said lands were sold to the defendant Cottell for \$2,250; and were the same day conveyed to him by Christian Sorenson, by a deed in which Mary Sorenson joined, barring her dower. Cottell and Christian Soren-

son then went to the sheriff's office and paid the amount of several writs of *fi. fa.*, and a small cash payment of \$70, leaving a balance of \$350 of purchase money due from Cottell, who afterwards on March 14th, 1884, gave a mortgage on the lands, to secure that amount, making it to Mary Sorenson, as mortgagee.

The plaintiff now brought this action claiming payment of his judgment debt and costs out of such part of the of the purchase money of the lands as had not yet been paid by Cottell, and in default of payment that Mary Sorenson might be declared to hold the mortgage of March 14th, 1884, in trust for Christian Sorenson, and that the same might be seized and sold and the proceeds applied in satisfaction of the plaintiff's claim, and for further relief.

In the joint statement of defence of Christian Sorenson and Mary Sorenson, it was amongst other things alleged that Mary Sorenson claimed to have been entitled to a right of dower in the lands in question, and that the mortgage given to her to secure \$350, was so made as a consideration for her dower in the said lands; and that she refused to join with her husband in the conveyance to Cottell unless a consideration was paid her in lieu of her said dower, and it was agreed between the defendants that she should receive \$350 in lieu of her right to dower in the said lands, and the mortgage from Cottell to her was given to secure the said sum.

The action was tried before Ferguson, J., at Sandwich, on June 8th, 1885.

A. O. Jeffery, for the plaintiff. Mary Sorenson holds the mortgage from Cottell, merely as nominee of her husband. It was not necessary for her to join in the deed to Cottell in order to destroy her right to dower in the equity of redemption.

Cameron, for the defendant. The mortgage from Cottell was made to Mary Sorenson in consideration of her joining in the deed to Cottell, thus barring her

dower, which she had in the lands sold. This was a valuable consideration, and she holds as a purchaser for value.

The following were cited on the argument: *Calvert v. Black*, 8 P. R. 255; *In re Music Hall Block, Dumble v. McIntosh*, 8 O. R. 225; *Black v. Fountain*, 23 Gr. 174; *Fleury v. Pringle*, 26 Gr. 67; and 42 Vic. c. 22 (O).

FERGUSON, J., held, following *Fleury v. Pringle*, 26 Gr. 67; and *Black v. Fountain*, 23 Gr. 174, that a wife has dower in an equity of redemption only where her husband dies seized, and the latter may defeat the right by alienation, and that the Dower Act of 1879, 42 Vic., ch. 22, (O) did not affect the case. Consequently the making of the mortgage to Mary Sorenson, was without consideration. He, therefore, gave judgment for the plaintiff, declaring Mary Sorenson to be a trustee of the mortgage from Cottell for her husband, and that this mortgage should be made available for the satisfaction of the plaintiff's claim.

A. H. F. L.

[CHANCERY DIVISION.]

KING ET AL. V. ALFORD ET AL.

Mechanics' lien—Railway buildings—Engine house and turn-table—Analogy of mechanics' lien to lien of execution creditors—R. S. O. 120.

Held, following *Breeze v. The Midland R. W. Co.*, 26 Gr. 225 (Proudfoot, J., dissenting) that a mechanic's lien does not attach upon an engine house and turn-table built for a railway company, and confessedly necessary for the proper working of the railway; and that such engine house and turn-table, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanic's lien.

There is nothing in the Mechanics' Lien Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanic's lien is not analogous to a vendor's lien.

Per PROUDFOOT, J. The Mechanics' Lien Act was intended to place mechanics on a more favourable footing than other creditors, and their right ought not to be measured by what could be realized upon an execution. There seems no distinction in principle between their position and that of an unpaid vendor of land.

THIS was an action brought by Eli King and others against J. W. Alford, J. Macnamara, and the Ontario and Quebec Railway Company, claiming a declaration that they were entitled to a lien, under the Mechanics Lien Acts, upon certain land of the railway company for the amount of wages due in respect of work done by them in the erection of a twelve stalled engine house and turn-table on the said land. The defendant Alford was the contractor with the railway company for the said work, and the defendant Macnamara was a sub-contractor for part of the work, and these two had employed the plaintiffs. The plaintiffs also alleged that a large sum was due to Macnamara from Alford, and also a large sum due to Alford from the railway company, in respect of the said contracts; and they claimed a declaration that they were entitled to a lien as aforesaid, and that all sums in Alford's hands to which Macnamara was entitled might be paid into Court, that the railway company might be ordered to pay to the plaintiffs moneys in their hands due to Macnamara and

Alford, and that if necessary the said land might be sold, costs of action and further relief.

The action was tried on November 30th, 1884, before Boyd, C., at Peterborough.

No oral evidence was adduced, but the following admissions were made. It was admitted that \$5,615.27 was due on the contract to Alford, who admitted that he owed Macnamara about \$892. It was also admitted that the amounts claimed by the plaintiffs were due by Macnamara, and that the work was done by Macnamara under a sub-contract with Alford, who was the contractor with the railway, and it was not disputed that the lands were essential for the working of the railway.

The learned Chancellor ruled that he was bound by *Breeze v. The Midland R. W. Co.*, 26 Gr. 225, and that the contractor could raise the question of jurisdiction, as it appeared that the lands were essential for the working of the railway; and he gave judgment for payment into Court of \$1,220 (being ten per cent. of Alford's contract price), and for payment of the balance of \$4,395.27 by the railway company to Alford, less the costs of the railway company. He directed that judgment should not issue until the holding of the Divisional Court, and that if his judgment should be upheld by the Divisional Court, then only \$892, less the costs of the railway company and of Alford (both to be paid to Alford) should be paid to the plaintiffs for distribution, and the balance of what was in Court should be paid out to Alford.

The plaintiffs moved by way of appeal before the Divisional Court, on February 27th, 1885.

W. Cassels, Q.C., for the plaintiffs. The American cases holding that a lien does not attach apply only to cases where the roads are state roads, or public money has been

expended on them. A lien holder is in a better position than an execution creditor. The latter cannot sell such property, but a lien-holder is entitled to the remedy of an unpaid vendor. The true analogy is with a vendor's lien. I refer to 45 Vic. c. 15, (O); 47 Vic. c. 18, (O); R. S. O. c. 1, s. 8, sub-s. 13; *ib.* c. 120, s. 2, sub-s. 3; *Breeze v. The Midland R. W. Co.*, 26 Gr. 225; *Wing v. Tottenham and Hampstead Junction R. W. Co.*, L. R. 3 Ch. 740; *Slater v. Canada Central R. W. Co.*, 25 Gr. 363; *Phillips on Mech. Liens*, 2nd ed. ss. 180, 182; *Hill v. La Crosse and Milwaukee R. W. Co.*, 11 Wis. 223.

C. Moss, Q.C., for the defendant Alford. *Breeze v. The Midland R. W. Co.*, 26 Gr. 225, is good law. The Act of the Ontario and Quebec Railway Company, 44 Vic. c. 44, (D.), shows it is a work for the general advantage of Canada, and it is doubtful if the Act of the local Legislature can apply to it. A vendor only parts with his land upon condition of payment of the money. The mechanic lienholder's rights are measured by those of an execution creditor, I refer to *Peto v. The Welland R. W. Co.*, 9 Gr. 455; *The Erie and Niagara R. W. Co. v. The Great Western R. W. Co.*, 19 Gr. 43; *Brinckerhoff v. Board of Education*, 37 How. Prac. R. (N. Y.) 499; *Williams v. Controllers*, 18 Penn. 275; *Graham v. Mount Sterling Coalroad Co.*, 14 Bush. (Ky.) 425; *Dunn v. North Missouri R. W. Co.*, 24 Mo. 493; *Botsford v. New Haven etc. R. W. Co.*, 41 Conn. 454; *Foster & Co. v. Fowler & Co.*, 60 Penn. 27; *Abercrombie v. Ely*, 60 Mo. 23. Even if the lien does attach on the buildings in question, the plaintiffs are not entitled to a lien for ten per cent. of the whole price of Alford's contract, but only of Alford's sub-contract with Macnamara: *Re Cornish*, 6 O. R. 259; R. S. O. ch. 120, s. 3; *Goddard v. Coulson*, 10 A. R. 1.

May 21st, 1885. BOYD, C.—*Esten, V.C.*, decided in 1862, that no sale of the lands and buildings of railway could be effected under process of execution: *Peto v. Welland R. W. Co.*, 9 Gr. 455. This was because the Legislature

had conferred powers upon railway companies of acquiring property and lands upon the understanding and with the intent that those lands should not be diverted or alienated to any other purpose through a proceeding *in invitum*. That has ever since been deemed well settled law in this Province. Based upon that no doubt is *Breeze v. The Midland R. W. Co.*, 26 Gr. 225, decided in 1879, when it was held that a mechanic's lien could not be enforced by way of sale against land required for the purposes of a railway. This decision has been hitherto acquiesced in, but we are now invited to review it, chiefly on the ground that this statutory lien is analogous rather to a vendor's lien than to a lien given by judgment and execution. It is a material ingredient of this case that it is found as a fact that the lands (on which are the buildings in question consisting of a turn-table and engine shed) are essential for the proper working of the railway.

In discussing the nature and effect of mechanics' liens, Pomeroy, in his *Equity Jurisprudence*, section 1268, 1269, says, that they are enforced by ordinary equitable actions resulting in a decree for sale and distribution of the proceeds identical in all their features with suits for the foreclosure of mortgages by judicial sale. Applying this test it is evident that the company could not itself subject this kind of lands to any mortgage which would be enforceable by a sale of the *corpus*: *Bickford v. The Grand Junction R. W. Co.*, 1 S. C. R., at p. 736, 737.

A vendor's lien arises out of the very nature of the transaction, and is inapplicable to a lien created by the statute for work and materials done and furnished in order to erect buildings on land. The vendor is considered not to have parted with his interest in and dominion over the subject of purchase till he has received payment of its price, and he is therefore permitted to follow the land itself (with certain restrictions) until he obtains satisfaction for its value. The Act itself rather indicates an analogy with proceedings by way of execution (see R. S. O. c. 120, s. 12), but I do not lay stress upon this.

The general principle laid down in *Phillips on Mechanics' Liens*, s. 179, applies here. He says: "Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must, for the same reason, be equally exempt from the operation of the mechanics lien law, unless it appears by the law itself that property of this description was meant to be included; and, to warrant this inference, something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property, enforceable as judgments rendered in other civil actions." Now railways generally are in these days essential to public use and convenience, and they are therefore protected on grounds of public policy from being cut in pieces and destroyed by sales under legal process. This particular road is indeed specifically designated by the Legislature which created it as one "of great public advantage," as being "for the general advantage of Canada," (44 Vic. ch. 44 (D.) *Preamble, sec. 1.*) There is nothing in the scope of the Act as to liens to indicate that it was intended to be operative to a greater extent than as giving a statutory lien issuing in process of execution of efficacy equal to but not greater than that possessed by the ordinary writs of execution. I do not think the law as interpreted by *Breeze v. The Midland R. W. Co.*, should now be changed, and therefore the judgment should be affirmed, with costs.

PROUDFOOT, J.—The sole question in this case is, whether or not a mechanic's lien attaches upon an engine house built for a railway company.

The language of the statute R. S. O., c. 120, s. 2, sub-s. 2, and c. 1, s. 8, sub-s. 13, is wide enough to render the property of any owner, corporate or otherwise, liable to the lien.

On the one hand it is argued that property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the mechanics lien

law, unless it appears by the law itself that property of this description was meant to be included ; and, to warrant this inference, something more must appear than the ordinary provision that the claim is to be a lien against a particular class of property, enforceable as judgments rendered in other civil actions ; and there are many instances in the American Courts where public school houses have been held not to be affected by the lien, and it is said it could not be the intention of the Legislature in any case to subject a county to the privation or loss of its buildings such as Court houses, public offices, or gaols, so indispensably necessary for the public benefit and accommodation, as also for the preservation of the public records containing the only evidence that thousands may have for their rights, and in which every individual of the community has a deep interest : *Phillips on Mechanics' Lien*, 2nd ed., ss. 179, 179a. And the general rule formulated from this class of decisions is, that the right of a mechanic to a lien is no higher than that of an execution creditor. And that as it has been decided that a railway cannot be sold upon an execution, that it and its property is not affected by this lien : *Peto v. The Welland R. W. Co.*, 9 Gr. 455 ; *The Erie and Niagara R. W. Co. v. The Great Western R. W. Co.*, 19 Gr. 43.

It is reasonable that there should be some qualification of the right to a lien in regard to public school buildings, and other buildings of a public character, and belonging to the public, such as Court houses, gaols, registry offices, &c., and it may perhaps be found that under our statute they are not subject to the lien. But the rule deduced from this class of cases is much wider than these cases warrant. A rule applicable to public property, is not necessarily applicable to private property, and it might well be held that public buildings are exempt while railway property is not. The reasons for the exemption in the one case, the public interest, do not apply, or apply only in a very modified degree, to the other.

The same unanimity of opinion in regard to the exemption of railways does not exist in the American Courts, as in regard to public buildings. Where the railway has been built by the State, it would be subject only to such liability as other public property. But where it is built by a corporation for private benefit, worked for private benefit, and the profits divided only among stockholders, the case is entirely different. The public are interested in having the road kept in operation, as affording easier and speedier modes of transit, but have no interest in the road itself or in the dividends to be derived from it. The property is private property. The question has been ably discussed in many American cases collected in Mr. Phillip's book (*Mechanics Liens*, 2nd ed.) s. 180, *et seq.* In some instances the railways have been held exempt. Language of this kind is used: "After a State has assumed an immense responsibility in building a railroad for the public use and convenience, it would be unreasonable to suppose a power remained in any individual to deprive the public of the benefit contemplated by it." In such a case the road is public property. The distinction is well marked in *McPheeters v. Merrimac Bridge Co.*, 28 Mo. 465, where it is said: "Because bridges, which are public highways, cannot be subject to the liens of mechanics, it does not follow that there may not be bridges which will be subject to them. We have seen there are such things as private bridges known to the law:" (at p. 458).

Where the railroads have not been built by the state, and where in fact the constitution of the state prevented it from engaging in such enterprises, as in Wisconsin, the rules applicable to any other private property have been applied. In the case of *Hill v. La Crosse and Milwaukee R. W. Co.*, 11 Wis. 223, it was held that depot buildings of a railroad company were liable to the lien. The Court say, at p. 233, if a railroad company purchase land for a depot building, and at the same time execute a mortgage to secure the purchase money, "there can be no conceivable reason of public policy that should prevent the enforce-

ment of such specific lien by means of which the company had acquired the very property itself. And we can see no distinction, upon principle, between allowing such a lien to be created by the mortgage of the company, and allowing it to be done by the force of the statute. A building built for a railroad company is as clearly within the letter and spirit of the statute, as any other building."

In the present case the railway was not a public work in the sense of belonging to the public, it was not built either by the Dominion or the Provincial Government, it was purely a private enterprise.

The statute was intended to place mechanics on a more favourable footing than other creditors. General creditors had a right to sue for their debts upon the common law liability of the company, but they had no specific charge. Mechanics were given a specific lien on the property. Their case is not the same then as that of general creditors, and their right ought not to be measured by what could be realized upon an execution. The true gauge of their right, I think, is that which the name expresses, a *lien*, and their remedies such as a lien holder might enforce, and it is immaterial whether the lien be created by mortgage or contract, or imposed by statute. There seems no distinction in principle between their position and that of an unpaid vendor for land sold to the railway, and it has been settled by numerous decisions that to enforce such a lien an order may be made for the sale of the railway: *Wing v. Tottenham, &c. R. W. Co.*, L. R. 3 Ch. 740; *Slater v. Canada Central R. W. Co.*, 25 Gr. 363.

Breeze v. The Midland R. W. Co., 26 Gr. 225, is very shortly reported, and I do not know the reasons for the decision; but I do not agree with the decision.

In *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. 696, the power of corporations generally to mortgage and charge their property is stated in very full terms. With regard to railway companies, it was inquired whether the mortgage in that case was inconsistent with any statutory destination of the property of the company subject to the

mortgage. It was not necessary to decide that the permanent way, station houses, and station grounds actually required for the use of the railway, could not be mortgaged for the purposes of the railway, for the railway company had other lands which it was held they clearly might mortgage. The Court assumed for the purpose of the judgment that the permanent way could not be mortgaged, but held the mortgage good as to the other lands. And the single question there was, as to the validity of the mortgage, and the nature and extent of the remedies were not discussed (p. 734). So that but little aid can be got from this case towards the solution of the question. The short sections, 1268, 1269, of Mr. Pomeroy's book are very general in their terms, and do not refer to railway liens or securities at all.

I cannot readily conceive any material distinction between the lien of a vendor and the lien of a mechanic. The vendor is considered not to have parted with his interest till paid for the land, a conclusion arrived at upon equitable principles, independent of any law sanctioning it. But our statutes give the mechanic a lien from the very commencement of his work—every brick or stone put into this engine house was secured by a lien as soon as it was laid. And the building was as essential for the use of the railway as the land upon which it was erected. It is a lien paramount to any contract,—does not depend upon agreement, and ought not to be governed by the rules applicable to enforcing agreements.

Mr. Moss referred us to the Dominion Statute 44 Vic. c. 44, incorporating the railway for which the work was done. The preamble declares that the construction of the railway would be of great public advantage, and form a most valuable line of communication for national defence, and be for the general advantage of Canada. But I do not see how that can effect this question. It is still a private undertaking, and of many others, such as the establishment of manufactures it might be predicted that they were for the general advantage, but there is nothing to shew that

the Parliament intended to relieve the company from the payment of their debts. It no doubt still left a vendor's lien untouched, and I think the present is in the same position.

The judgment should be accordingly.

FERGUSON, J.—The question for determination in this case seems to be, whether or not the lands of a railway company on which they have erected their engine house, confessedly necessary for the proper working of the railway, can be sold under a proceeding for the purpose of enforcing payment of the amount of a mechanic's lien.

In the case *Slater v. The Canada Central R. W. Co.*, 25 Gr. 363, it was decided that when lands are taken possession of by a railway company under the powers conferred upon them by the Act, the Court will not order the possession to be restored in case of default in payment of the amount of compensation accorded to the owners, and it was held that the proper remedy was a sale of the land. Near the conclusion of his judgment the late Chief Justice, then the Chancellor, referring to the case *King v. The Tottenham and Hampstead Junction R. W. Co.*, L. R. 3 Ch. 740, said that case settled the question that where there is a vendor's lien the parties are entitled to enforce it in the way any other lien can be enforced, that is by a sale. In the case referred to, Lord Justice Selwyn, at the conclusion of his judgment, said: "I have no hesitation in saying that the whole practice of the Court shews that a vendor of land to a railway company is with respect to his lien, in no different position from a vendor of land to any other person."

The lien of the vendor, it is said, is wholly independent of any possession on his part, and it attaches to the estate as a trust equally whether it be actually conveyed or only contracted to be conveyed. It is said that the principle on which Courts of Equity have proceeded in establishing this lien in the nature of a trust is simply, that a person who has gotten the estate of another ought not in con-

science, as between them, to be allowed to keep it and not pay the full consideration money. See *Sugden's Vend. and Purch.*, 8 Am. ed. 671, note *d*, and cases there referred to.

In *Peto v. The Welland R. W. Co.*, 9 Gr. 455, it was held that a judgment creditor of a railway company with an execution against the lands of the company lodged in the hands of the sheriff, is entitled to the appointment of a receiver of the earnings of the road, the profits thereof to be applied in payment of his demand, but that no sale of the lands and buildings of the railway could be effected under process of execution. This case is, as I understand undisputed law at the present time. The decision was apparently placed on the grounds of public policy. In the case, *Gilman v. Brown*, 1 Mason (C. C. U. S.) 191, at p. 221, Mr. Justice Story said: "The lien of a vendor for the purchase money is not of so high and stringent a nature as that of a judgment creditor, for the latter binds the land according to the course of the common law, whereas the former is a mere creature of a Court of Equity, which it moulds and fashions according to its own purposes."

From these authorities it would seem that a vendor, though his lien is not of so high or stringent a nature as the lien or charge of a judgment creditor, can have the lands and buildings of a railway company sold for satisfaction of his purchase money when the execution creditor cannot have them sold for satisfaction of his debt, and it appears to me that this can only be because a Court of Equity will execute the *trust* in his favour. The claim of the vendor by virtue of his lien seems to be of a nature quite different from that of an execution creditor.

The lien holder under the provisions of the Mechanics' Lien Acts, it may be contended, has a lien given him directly by statute and that, for this reason, his right is of a higher and more effective character than that of the execution creditor. It will be found, I think, that in this country the rights of the execution creditor against the lands of his debtors is given him by statute law, and, I

think much more closely resembles, in kind, the right of a holder of a mechanic's lien than does the latter resemble in kind the vendor's lien, and I do not see that the fact that the lands of a railway company may be sold for the purpose of satisfying a vendor's lien, affords any sufficient ground for saying that they should be sold for the satisfaction of a mechanic's lien when they could not be sold to satisfy the claim of an execution creditor, who, from the time of the placing of his writ in the hands of the sheriff has a lien upon the lands of his debtor. Counsel contended that the vendor's lien furnished the analogy in this case that must govern.

The vendor's lien is in the nature of a trust. It is a trust. Neither the mechanic's lien nor that of an execution creditor is such a trust. The vendor, before sale, had the estate in the land, and it is because the purchaser cannot in equity have both the land and the purchase money that this lien in the nature of a trust arises. Neither the holder of the mechanic's lien nor the execution creditor had the estate in the land, and there is no room for such a trust arising. Each has a lien upon the land, but not at all the same, in kind, as the vendor's lien, and, with all respect for the argument, I do not think the contention can prevail.

In the case, *Breeze v. The Midland R. W. Co.*, 26 Gr. 225, the bill was filed to enforce a mechanic's lien for work done upon a station house of the defendant, the railway company, and the cause was heard *pro confesso*. The judgment of the learned Judge was short. He said: "I do not think that you are entitled to that relief as against the land of a railway company required for the purposes of their railway. The only decree I can make is one for the payment of the amount due, with costs." The decision was in 1879, and has, I believe, ever since been acquiesced in. I do not perceive any reason for saying that it is not good law, on the contrary I think it is; and I think the judgment should be affirmed, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

BANK OF HAMILTON V. HARVEY.

Non-negotiable promissory note—Right to recover—Pleading.

The statement of claim was, that the defendant, being a director of a company, jointly and severally with three others made a promissory note payable to said company, with the intent that it should be used by the company upon the credit of the makers for the purposes of the company, and the company indemnified the makers against liability thereon; that the plaintiffs discounted the note for the company, and with the knowledge and consent of the defendant, paid the proceeds to the company, and the money was applied to the purposes of the company, and that after default in payment the defendant gave security to the plaintiffs against his liability upon the note.

Held, on demurrer, statement of claim good, and that the plaintiffs were entitled to recover against the defendant the amount of the note, though not a negotiable instrument.

ACTION against John Harvey upon a promissory note made in the following form :

"\$7,500.

MONTREAL, 13th April, 1883.

Six months after date we jointly and severally promise to pay to the Dominion Salvage and Wrecking Company seven thousand five hundred dollars at the Union Bank of Lower Canada office in Montreal, with interest, for value received :

H. HERRIMAN.

T. W. HENSEAW.

T. R. BATTERBURY.

JOHN HARVEY."

The statement of claim was to the following effect :

The defendant, at the time of the making of the note, was a director in the Salvage and Wrecking Company, an incorporated company; and the company being in want of funds procured the defendant and the other signers of the note to make it for the purpose of the company discounting it.

2. The company's head office was and is in Montreal, but it is authorized to do business throughout Canada.

3. The other three makers, with the defendant, are domiciled and resident in the Province of Quebec, and have no property in Ontario. The defendant resides and

does business in Hamilton, in this Province, and he signed the note in Hamilton.

4. It was the intention of the defendant that money should be lent to the company upon the note; and the company gave to the makers of the note security against their liability thereon.

5. Before the month of June, 1883, the company, with the knowledge and consent of the defendant, sent their general agent to Hamilton to arrange with the plaintiff for the discount of the note; and the company duly indorsed, assigned, transferred, and delivered the note to the plaintiffs at Hamilton, and the plaintiffs then and there discounted the note, and the plaintiffs then became and now are the lawful holders and assignees of the same.

6. The plaintiffs, with the knowledge and consent of the defendant, then paid over \$7,492.42, the proceeds of the note, to the company's agent in Hamilton.

7. The moneys were, with the knowledge and assent of the defendant, duly applied by the company to the purposes of the company.

8. The defendant and the other parties to the note have made default in the payment of the note, and the whole amount of it is still due and unpaid; and the company has also failed to pay the note, or the amount advanced thereon; and the note was duly presented and protested for non-payment.

9. After the note fell due, and before the bringing of this action, the defendant transferred to the plaintiffs certain shares in the Hamilton Provident and Loan Society of the value of about \$1,500, as and by way of security *pro tanto* for the payment by the defendant to the plaintiffs of the amount of the note; but nothing has been paid or realized upon or from such security, and the plaintiffs still hold the said security.

The defendant demurred to the statement of claim, because it shewed no privity between the plaintiffs and the defendant, nor any liability on his part, nor any law

by which a promissory note not negotiable could be assigned to entitle the assignee to maintain an action upon it ; and because the defendant was treated as a guarantor and the statement of claim did not shew the guarantee to be in writing.

The case was argued on the 22nd September, 1885, by.

Muir, for the demurrer, who referred to *Plimley v. Westley*, 2 B. N. C. 249 ; R. S. O. ch. 116, sec. 12 ; *Goodwin v. Roberts*, 1 App. Cas. 476.

Edward Martin, Q. C., contra, cited *Chisholm v. Proudfoot*, 15 U. C. R., at p. 212.

September 29, 1885. WILSON, C. J.—It was vehemently denied at one time that a promissory note could be sued upon in like manner as an inland bill of exchange. It was said that the maintaining of an action upon such notes was an innovation upon the rules of the common law, and that continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness : per Holt, C. J., in *Clerke v. Martin*, 2 Ld. Raym. 758.

The Statute of Anne was passed to put these instruments on the same footing as inland bills ; but neither before nor since that Act has it ever been contended that a promissory note, or a bill of exchange, drawn in a non-negotiable form, can be indorsed with the like effect, or be sued upon by any other person than the payee himself. It was not contended on the argument that the plaintiffs could maintain their action as mere indorsees of the promissory note. The indorsee of a transferable note, it was said, would simply allege he was indorsee, and his cause of action would be complete. But the plaintiffs, it was contended, have nevertheless a good cause of action, not upon the mere indorsation, but upon the facts connected with the making and indorsation of the notes which are set out in the statement of claim.

[Here the substance of the pleadings, as above set out was stated by the learned Chief Justice.]

The question is, do these facts give the plaintiffs a cause of action for the amount payable by the note against the defendant? The facts shortly stated are as follow :

The defendant made the note jointly with the other makers, with the intent that it should be used by the company upon the credit of the makers for the purposes of the company, and the company indemnified the makers against the liability they had assumed.

The plaintiffs discounted the note for the company, and with the knowledge and consent of the defendant, paid over the proceeds of the same to the company, and the money so obtained was applied to the purposes of the company ; and since default was made by non-payment of the note, the defendant has given security to the extent of \$1,500 to the plaintiffs against his liability upon the note.

I may say here that "The Mercantile Amendment Act," R. S. O. ch. 116, sec. 12, expressly enacts that the provisions relating to the assignment of choses in action "shall not be construed to apply to bills of exchange or promissory notes."

The plaintiffs have prayed that the defendant may be ordered to pay the amount of the note and interest, and for such other relief as to the Court shall seem fit ; so that if the plaintiffs can have any relief, they are entitled to it. The general facts, as stated, shew the company are the principal debtors, and the makers of the note are guarantors or sureties, although their relative positions upon the note represent them in the inverse order.

The plaintiffs must establish a privity with the defendant, in this transaction of discounting the note, to enable them to recover. The cases more directly applicable are : *Moore v. Bushell*, public officer, 27 L. J. Ex. 3, and *Hill v. Royds*, L. R. 8 Eq. 290.

In the first of these cases the acceptor of a bill of exchange paid money to his banker, the defendant, at whose correspondent's house it was payable, for the pur-

pose of taking it and other bills up, and they promised him to apply it to such purposes, and they entered the particular bill to their credit in their books, but it did not appear they had advised their correspondents to pay it. Held, the drawer, the holder of the bill, could not sue the bankers for the amount of the bill, there being no privity to sustain the action. There was no promise made to the drawer by the defendants, nor any act done by the defendants shewing they had appropriated their money to the particular bill.

If money is transmitted by a debtor to another to pay to the creditor, and the remittee admits to a person that he holds it for the creditor, and he permits that person to inform the creditor of his so holding it, held the creditor may sue the remittee for the money: *Lilly v. Hays*, 5 A. & E. 548.

If one, for whom a debtor remits money to another to pay to a creditor, receives from the creditor an order from the remittee or debtor to pay his creditors, that will not entitle the creditor to sue the remittee for the money, but if the remittee say or do anything by which he accepts the order, or engage to pay the creditor, he will be directly liable to him: *Noble v. The National Dispatch Co.*, 5 H. & N. 225. See also *Lampleigh v. Brathwait*, 1 Sm. L. C. 8th ed. pp. 155, 156.

The delivery of an order to one who holds money of a debtor, or who owes the debtor, to pay the creditor of that order, and the acceptance by him of the order, or his assent to the terms of it, are binding upon him, and the creditor can maintain an action against him for the money: *Walker v. Rostron*, 9 M. & W. 411; *Griffin v. Weatherby*, L. R. 3 Q. B. 753. The case of *Hill v. Royds*, L. R. 8 Eq. 290, is very similar to the case of *Moore v. Bushell*, 27 L. J. Ex. 3, which it follows. See also *Goslin v. Agricultural Hall Co.*, 1 C. P. D. 482.

I am of opinion that, as the defendant and his co-makers signed the note in order that it should be used by the company by discounting it upon the credit of the company

for a purpose in which the makers, as directors of the company, were beneficially interested, and the plaintiffs discounted the note, and with the knowledge and consent of the defendant paid the company the proceeds of the note, and as the defendant has expressly admitted his liability by giving to the plaintiffs security on account of his liability to them, that that is a sufficient ground of action stated in the claim made by the plaintiffs to entitle them to recover the amount of the money mentioned in the note from the defendant, and I give judgment for the plaintiffs on demurrer, with costs.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

BAKER V. JACKSON ET AL.

Recognizance of special bail—Judge's order to hold to bail—Non-liability of bail beyond amount mentioned therein.

A Judge's order to hold to the bail in the sum of \$300, was obtained in an action of tort, in which the affidavit swore to a cause of action for \$500. The bail piece was in the usual form, stating: "Bail for \$300 by order of," &c. The recognizance of bail was in the words of the statute, namely: "You," the bail "do jointly and severally undertake that if" the defendant in the original action shall be condemned, then he shall pay the costs and condemnation money, or render himself to the custody of the sheriff," &c., "or you will do so for him." Rule 89 of T. T. 1856, provides that "the bail shall only be liable for the sum sworn to by the affidavit of debt and costs of suit, not exceeding in the whole the amount of their recognizance." In the original action a verdict was obtained against the defendant for \$400, and \$125.27 costs. In an action on the recognizance against the bail, *Held*, CAMERON, C. J., dissenting, that the undertaking in the recognizance to pay the condemnation money, read in connection with Rule 89, meant the amount mentioned in the Judge's order; and therefore the bail in this action were only liable for the \$300, the amount mentioned in the Judge's order, and the costs of the original and of this action. The reasonableness of having the recognizance express its meaning in simple language, instead of adhering to a form of words adapted to meet a different practice, suggested.

Action against bail to recover the amount for which they were liable on the recognizance of special bail to the action.

The cause was tried before Cameron, C. J., without a jury, at Chatham, at the Spring Assizes of 1885.

The original action was for damages caused by the seduction of the plaintiff's daughter.

A Judge's order to hold to bail was obtained on an affidavit in which the plaintiff swore to a cause of action for \$500. The order provided for bail in the sum of \$300.

The bail piece was in the usual form, stating the sum mentioned in the order for arrest in the following words: "Bail for \$300 by order of Gordon Watts Legatt, Esq., Judge of the County Court of the county of Essex."

The recognizance of bail was in the words of the statute as follows:

"You, Ephraim Jackson and Edward Hartford, do jointly and severally undertake that if Henry Wilkinson shall be condemned in this action at the suit of Noah Baker, he shall satisfy the costs and condemnation money, or render himself to the custody of the sheriff of the county of Essex, or you will do it for him." See R. S. O. ch. 50, sec. 40.

The plaintiff recovered against Wilkinson \$400 and \$125.27c. costs; and all the issues on the record in this action having been found by the learned Chief Justice in the plaintiff's favour, judgment was entered against the bail for the \$525.27, and the costs of this action.

In Easter Sittings *W. Douglas* (of Chatham), moved on notice to reduce the judgment to \$300, the amount of the bail piece, and the costs of the action.

During the same sittings, May 3, 1885, *W. Douglas* supported the motion. The bail are only liable to the amount of the Judges's order, namely, \$300, and the costs of suit, although the sum recovered with costs of suit amounted to more than that sum. The case is governed by Rule 89, of Trinity Term, 1856, which is clear on the subject. That rule provides that "the bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance:" *Harrison's C. L. P. Act*, 2nd ed., p. 668. The rule must be read as if the words, "named in the Judge's order," were substituted for the words "sworn to by the affidavit of debt." The rule is taken from the English Rule 109 of Hilary Term, 1853, and *Jonas v. Tepper*, 1 E. & E. 327, decided under that rule clearly shews that the above is the proper effect to be given to the rule.

Lash, Q. C., contra. Section 40 of the C. L. P. Act, R. S. O. ch. 50, points out what the condition of the recognizance shall be, namely, that if the defendant be condemned in the action at the suit of the plaintiff, he will satisfy the costs and condemnation money, or render

himself to the custody of the sheriff of the county in which the action against such defendant has been brought, or that the bail will do so for him. The recognizance follows this section. The provisions for making the arrest and giving bail are contained in R. S. O. ch. 37, sec. 5. The defendants' contract is to pay the condemnation money and costs. But even if the defendants might not have been bound to enter into such a contract they have done so here, and are accordingly liable. The case of *Jonas v. Tepper*, 1 E. & E. 327, is really in the plaintiff's favour. All that it shews is, that the defendants are only liable for the amount of the bond; and the amount of the bond there was less than the sum sworn to

W. Douglas, in reply. Before the passing of Rule 89, the present form of recognizance was the one then used. After the Rule was passed it was said that the form should still be used, but was to be restricted to the amount of the Judge's order.

June 27, 1885. ROSE, J.—This is a motion to reduce the judgment entered at the trial to \$300.

Mr. Douglas contended that his clients were only liable to have judgment entered against them for \$300, and the costs in this suit; but on the plaintiff pressing for a judgment for the full amount, as in accordance with the language of the recognizance, the learned Chief Justice so entered the judgment, leaving the defendants to move to reduce the amount; and accordingly this motion was made.

Mr. Douglas relied upon Rule 89 T. T. 1856, and *Jonas v. Tepper*, 1 E. & E. 327.

Rule 89 is as follows: "Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance."

This rule may be found in *Harrison's C. L. P. Act*, 2nd ed., p. 668, where it is stated to be taken from Eng. R. G. No. 109 of H. T. 1853, the origin of which was the Eng. R. G. No. 21 of H. T. 2 Wm. IV.

Rule 21 may be found in the 3rd ed. of *Chitty's Archbold's Prac.*, (1836), p. 506, and is in the exact terms of rule 89.

In a foot note to page 506 is a reference to rule E. T. 5 Geo. II. r. 2, which I take to be the rule found in p. 192. of *Petersdorf's Abridgment*, vol. 3, (1825), and is as follows: "It is ordered that where the plaintiff declares for, or recovers a greater sum than is expressed in the process on which he declares, the bail shall not be discharged, but be liable for so much *as is sworn to and endorsed on the said process*, or for any lesser sum which the plaintiff in such action shall recover, any rule of this Court to the contrary notwithstanding."

This latter rule was passed in consequence of an expression of opinion of Holt, C.J., in *Genbaldo v. Cognoni*, M. T. 1703, K. B., 1 Salk. 102, *Petersdorf*, vol. 3, p. 191. In that case the plaintiff brought an action of trespass, &c., by bill of Middlesex with an *ac etiam* for £40, and recovered £100. The Court held that the bail should not be liable for more than the *ac etiam*, for that was the measure of the undertaking; and by Holt, C.J., that the bail were not liable at all, because the recognizance is to answer the condemnation money, and since that could not be, they were bound for nothing.

By R.G. H. T. 38 Geo. III., Exch., 8 Price 502, *Petersdorf*, vol. 3, p. 198: "It is ordered, that upon recognizance of bail in an action brought in this Court, the bail therein shall not be jointly or severally liable in such action for more in the whole than the amount of the sum sworn to in the affidavit, together with the costs of such action, unless any proceeding be had on their recognizance, in which case they shall also be subject to such other costs as they may now be liable to by law."

See also cases collected in *Chitty's Archbold's Prac.*, 3rd ed., p. 506, note (o).

It will be remembered that the rules of H. T. 2 Wm. IV. were passed to render uniform the practice of the K. B., C. P. and Ex. of P.

The case of *Dahl v. Johnson*, H. T. 1798, in the Common Pleas, found with other cases in *Petersdorf*, vol. 3, p. 197, is of interest as throwing light upon the practice then observed in the Common Pleas. In that case the bail entered into a recognizance for double the amount of the demand, and after verdict and proceedings against the bail, they applied to stay proceedings on payment of the sum mentioned in the Judge's order,

Per cur "The case must be determined by the settled practice of the Court, * * and as a recognizance is taken from the bail in double the amount sworn to, they must be liable for the whole sum unless indeed there is such a misunderstanding as from the equity of the case the Court should think proper to relieve the bail. The use of a Judge's order is introduced to obviate difficulty in particular cases where the exact amount cannot be ascertained, and it is therefore referred to a Judge to order what is proper; *but when the sum is ascertained, the same course is followed as on an affidavit to hold to bail. There is, therefore, no difference between such cases.*" The report states that "on the bail paying the amount of the recognizances and costs the rule was made absolute."

Reading the above rules of E. T. 5 Geo. II., H. T. 38 Geo. III. and the above decision, much light is thrown upon rule 21 H. T. 2 Wm. IV.

For a collection of these rules see *Charnock's New Rules* bound together with *Bosanquet's New Rules*; and see the notes to Rule 21, p. 35.

By 1 & 2 Vic. ch. 110 was abolished arrest on mesne process in civil actions, except in certain cases; and important changes were introduced into the law relative to bailable proceedings.

By the 3rd section provision was made for obtaining a writ of *capias* by Judge's order in all actions in which the defendant was previously liable to arrest, whether with or without Judge's order.

On such a writ the defendant may be arrested and held to bail in nearly the same way as under the former writ of

capias. See *Chitty's Archbold's Prac.*, 12th ed., p. 727. R. S. O. ch. 67, sec. 5, contains similar provisions.

Jonas v. Tepper, 1 E. & E. 327, was decided in 1858, some twenty years after the passing of 1 & 2 Vic. The headnote is: "A Judge's order for a capias under Statute 1 & 2 Vic. ch. 110, sec. 3, was drawn up by mistake for holding to bail for a less sum than that sworn to in the affidavit of debt; the capias was endorsed for the less sum, and a bail bond was executed in a penal sum for the amount of such less sum," i. e., double the amount. "*Held*, that on payment of the lesser sum and costs, though making a sum less than the penal sum in the bond, the bail were entitled to have the bond delivered up, and to be discharged."

After argument the rule was made absolute, the Court saying that "the sum sworn to by the affidavit of debt must now be understood as meaning the sum mentioned in the Judge's order, and endorsed on the writ as ordered." Wightman, J., added, that "the old practice was done away with."

It was argued that rule 89 referred to bail to the sheriff, and not to bail to the action, as the bail bond to the sheriff had a penal sum named which limited the liability in the recognizance, while the form of recognizance of special bail, R. S. O. ch. 50, sec. 40, provided for payment of the whole condemnation money.

This is, I think, an error. *Jonas v. Tepper*, shews that the bail to the sheriff are not liable for an amount greater than that mentioned in the Judge's order, and endorsed on the writ as so ordered; but I think it also clear that the liability of bail to the action is limited to the amount named in the order.

If we look at the practice as settled in England: *Chitty's Forms*, 10th ed., we find, on p. 407, one of the endorsements on the writ, "Bail for — by order of; (naming the Judge making the order);" on p. 408, the form of bail bond to the sheriff "in the sum of — (usually double the sum endorsed on the writ);" the recital that "whereas he is by the said writ required to cause special bail to be put in

for him," &c.; and the condition "that if the said C. D. do cause special bail to be put in for him to said action in Her Majesty's said Court as required by the said writ, then," &c.; on p. 423, the form of bail piece in the Queen's Bench, where is noted; "Bail for £— by order of (*name of Judge who made the order to hold to bail*);" on p. 424, form in the Common Pleas, where immediately after the above note is found: "The bail B. B., of —, and T. B., of —, each of whom is bound in £— (*the amount for which defendant is held to bail*)"; and in Exchequer a form similar to that in the Queen's Bench save that the bail sign the bail piece; and, on p. 425, a form of recognizance in language similar to sec. 40 of R. S. O. ch. 50, which form is given as applicable to the form of bail piece in each of the three Courts.

It thus appears that by the form in the Common Pleas an amount for which the bail is to be liable is named in the bail piece, naming the amount for which defendant is held to bail, and an undertaking is given to pay the condemnation money, which when read with rule 21 H. T., 2 Wm. IV., means "the sum sworn by in the affidavit of debt and the costs of suit" and substituting for "the sum sworn to by the affidavit of debt," "the sum mentioned in the Judge's order and endorsed on the writ as so ordered," the instrument states the same liability in its various parts and the bail would only be liable for the amount for which the Judge ordered the defendant to be held to bail, and the costs of suit, that is, if the bail paid such sum into Court they would be entitled to have the bail bond delivered up to be cancelled.

If however, they did not take such a course, it seems clear in reason and on authority that they would be liable for the costs of such proceedings as are taken against them to enforce payment. See *Chitty's Archbold's Prac.*, 12th ed., p. 870,

It will not be contended that the liability would be different according to the bail piece used, whether in Q. B. Exch., or C. P.

It would seem more reasonable to have the recognizance express what it means in simple language, instead of adhering to a form of words which was adopted to meet a different practice.

I think the judgment must be reduced by \$100, that is, remain for \$300, \$125.27, and the costs of this action.

The defendants should have their costs of this motion to be deducted from the costs in the action.

GALT, J., concurred with ROSE, J.

CAMERON, C. J.—I am of opinion the plaintiff is entitled to retain his judgment for the full amount of the judgment against the debtor Wilkinson; and I have come to that conclusion because by section 40 of R. S. O. ch. 50, the condition of the recognizance is required to be "if the defendant be condemned in the action * * he will satisfy the costs and condemnation money, or render himself to the custody of the sheriff, &c.," or the bail will do so for him.

The condemnation money is the amount of the judgment against the debtor, and the costs are the costs in that action. Rule 89 passed under section 313 of the Common Law Procedure Act, 1856, provides: "Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance."

Now assuming that this rule was one within the jurisdiction of the Judges framing it to pass, it only professes to limit the liability of the bail to the sum sworn to where the arrest is for debt; that is, for a sum certain, and not for a wrong or unliquidated damages. The rule is therefore inapplicable to the case of bail in an action of tort. It does not appear to me that the statutory terms of the recognizance, and the obligation thereby assumed by the bail, can, by the arbitrary action of the Court, be converted into an undertaking on the part of the bail to pay only the amount named in the Judge's order.

I quite concede that the defendant in the original action was not bound to find bail for any greater amount than the sum for which the Judge's order directed the bail to be taken. But it was for the defendant in that action, and the bail themselves, to take care that no greater liability was undertaken by them than the law required.

If the statutory terms of the recognizance could be affected by rule 89, or the fact that the action was in tort and not for a specific money demand, then the condition should have provided that the debtor would pay the condemnation money, not exceeding the amount named in the Judge's order, and the costs of suit, or the bail would do so for him. When rule 89 was passed arrests were permitted in torts and in cases of unliquidated damages upon Judge's order as now; and there was then, as in this case, a sum sworn to as the amount which the plaintiff in the action claimed to be entitled to recover.

In the absence of rule 89, I presume there would be no room for the contention that the bail would not be liable for the full amount of the costs and condemnation money. They could, as far as I can see, be liable under no circumstances for more than the sum sworn to if the judgment against the debtor was merely for that sum; but if the judgment was for a greater sum, that greater sum would be the condemnation money, and hence the necessity for the rule restricting the liability to the sum sworn to. The existence of the rule is the strongest argument that, without it, the amount for which judgment was directed in this action, being in strict accordance with the terms of the defendants' obligation, is right and warranted in law.

It was urged by Mr. Douglas with much force, that *Jonas v. Tepper*, 1 E. & E. 327, is a clear authority in favor of his contention, and must be regarded as expressly deciding that rule 89 in actions of tort, is to be read as if the words "named in Judge's order" were substituted for the words, "sworn to by the affidavit of debt;" and then it would read: "Bail shall only be liable for the sum named in the Judge's order and the costs of suit, not exceeding in the

whole the amount of their recognizance," that is, than the amount of the judgment recovered against their principal. But I think it clear that that case cannot be deemed an authority decisive of the question. It was not the question in judgment before the Court. The question there presented was whether, in a case where the Judge's order had been drawn up by mistake for a less sum than the debt sworn to, the *capias* endorsed for that sum, and the bail bond executed in a penal sum double the amount endorsed on the *capias*, the bail to the sheriff were on an application for relief to the Court entitled to be discharged on payment of the amount endorsed on the *capias* and all costs, though less than the penalty in the bond. It was held that they were entitled to be discharged. The Court gave no reason for discharging the bail at the time of delivering judgment, but it is stated in the report of the case that at a later part of the day, Erle, J. stated "that the judgment of the Court was to the effect that 'the sum sworn to by the affidavit of debt' must now be understood as meaning the sum mentioned in the Judges order and endorsed on the writ as ordered," and Wightman, J. added: that "the old practice was done away with."

It seems to me that case was very different and distinguishable. The bond recited the *capias* and the amount of debt due from the debtor to the plaintiff endorsed thereon. The payment of the debt and costs would be the full obligation assumed by the bail, though the undertaking was to render the defendant, or put in special bail.

Here the undertaking is express not to put in bail, but to render the debtor or pay the condemnation money, that is, the amount for which the debtor should be condemned, without recital of any kind to limit the liability, and nothing appearing except the marginal memorandum on the recognizance, "Bail by Judge's order \$300."

It is not necessary to say whether the Court, in the exercise of an equitable jurisdiction in bailable proceedings, would, if the bail applied for relief, not now discharge the

bail upon payment of the amount of the Judge's order and all costs since incurred. But the plaintiff has brought his action upon a recognizance, the debt, by the terms of which is fixed at the amount of the judgment recovered against the debtor and costs, and without rectifying the recognizance, if it could now be rectified, the amount recoverable on that recognizance as it is recorded, must be the amount that appears of record against the debtor; the damages and costs being both fixed thereby. The rule and practice in England before 1852, when rule 21 of the English General Rules of Hilary Term, 2 Wm. IV., was passed, made bail liable for the full amount of judgment against the debtor: *Dahl v. Johnson*, 1 B. & P. 205; while in the King's Bench it was held otherwise: *Jackson v. Hassell*, 1 Doug. 330. And in the King's Bench before the said last mentioned rule bail to the sheriff was held liable for the whole judgment debt and costs, if not in excess of the penalty in the bond: *Stevenson v. Cameron*, 8 T. R. 28.

I have said, assuming that Rule 89 was within the competency of the Judges to pass under the power given to them by section 313 of the Common Law Procedure Act, 1856, 19 Vic. ch. 43, thereby implying a doubt as to the validity of the rule, my reason for doing so, while I do not think it absolutely necessary so to decide in this case, as in my view the defendant does not bring himself within its protection, is, that section 313 gives power to make rules and orders only in certain cases, and for certain purposes, that is to say, "for the effectual execution of this Act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, and for apportioning the costs of issues, and for the purpose of enforcing uniformity of practice in the allowance of costs in the said Courts as in their judgment shall be necessary or proper." This power would seem to be confined to the special subjects indicated, all in furtherance of the object of the Act, and possibly might in accordance with the view of Chief Baron Pollock permit the alteration of its provisions in such furtherance: See *Rouberry v. Morgan*, 9 Ex. 730.

But the undertaking of bail in their recognizance of bail was given by an independent statute then in existence, that is to say, 2 Geo. IV. ch. 1, sec. 11; while, therefore, for the mere purpose of carrying the provisions of the Procedure Act into effect, the Judges are empowered to make rules, it cannot be assumed, where they have not repealed another Act, the legislature intended to give the Judges power to make rules interfering with and abrogating the express terms of such Act. See opinion of Baron Parke in *Rowberry v. Morgan*, at p. 734.

It is to be observed, notwithstanding, rule 89, section 11, of the 2 Geo. IV. ch. 1, finds a place in the Revised Statutes of Ontario, as sec. 4 of ch. 50 thereof, and these statutes have been revised long since the Rule 89 was passed, and must now be taken to be the law as to the obligation of bail, and to over-ride the rule if it ever had the force of altering the obligation of bail who had entered into a recognizance like the present.

I am of opinion for the reasons above given, which resolve themselves into these, the terms of the recognizance itself and the sum sworn to, warrant a judgment in the plaintiffs favour for the amount he has recovered, that the judgment he has obtained cannot be reduced on a motion like the present, and the defendants' motion should be dismissed with costs

I may add, as at the time the bail was entered into the parties had reason to believe they were only incurring a liability to the amount of \$300 and costs, that I am not sorry that my learned Brothers take a more favourable view for the defendants than I have been able to do.

Motion allowed.

[COMMON PLEAS DIVISION.]

DONNELLY V. DONNELLY.

Husband and wife—Wife's separate trading—Interference of husband—Injunction.

The plaintiff, a married woman, carried on business as an hotel-keeper, and owned the chattels in the hotel. The defendant, her husband, interfered with the plaintiff in her business by taking the receipts, giving orders to servants, and maltreating the plaintiff.

An injunction was granted restraining the defendant from interfering in the business or with the servants or agents, or removing any of the plaintiff's chattels.

Semble, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances.

The defendant was committed for breach of the injunction, but was discharged on an application explaining and apologizing for his contempt. It appeared that he was unable to pay costs, and therefore, though costs of both motions were imposed, payment thereof was not made a condition of such discharge.

THIS was a motion to make perpetual an interim injunction granted by Rose, J.

The action was by a married woman seeking to restrain her husband from interfering with the hotel business carried on by her in Port Hope, or the chattels in the hotel.

The defendant did not appear to the writ of summons, or plead to the statement of claim.

The business and chattels appeared from the statement of claim to belong to the wife. The husband was interfering with the plaintiff in the prosecution of the business, taking the receipts from the bar, interfering with the servants, and maltreating the plaintiff personally; and just previous to this application being made struck her with his closed fist in the face and about the head, catching her by the hair, and inflicting painful injuries upon her person.

On March 3, 1885, *W. R. Riddell* supported the motion. No cause was shewn.

March 4, 1885. ROSE, J.—I think the case of *Symonds v. Hallett*, 24 Ch. D. 346, cited by Mr. Riddell, and the cases of *Green v. Green*, 5 Hare 400 note; *Taylor v. Meads*, 34 L. J. N. S. Ch. 203, and *Wood v. Wood*, 19 W. R. 1049, there cited, fully warrant the order asked for.

There the injunction was asked to prevent the husband entering the house of the wife pending proceedings for divorce, and to restrain him from removing any of the chattels.

Cotton, L. J., said, at p. 351: "I concur in the view that this injunction ought not to be discharged, on this ground, that, looking at the circumstances of the case and at the facts which we have before us, and the affidavit of the husband, he cannot be considered as desiring to use or to enter this house as a husband, to enjoy the society of his wife, or to consort with her as his wife."

Bowen, L. J. said, at p. 353: "The husband is not really asking for the benefit of his wife's society. * * The true effect of the affidavit, if you look at it, is this; that he complains of not being allowed the proprietary use of the house." He concurred in continuing the injunction.

In this case the order asked for is not to exclude the defendant from the house. Had such relief been asked, I think, on the facts, I would have granted it. I cannot see what right a man has to enter a house owned by his wife for the purpose, not of seeking the comforts of a home, but to abuse, annoy, injure, and maltreat her, destroying her comfort and peace of mind, and putting her in peril of her life or health. By marital rights, cannot be meant the right of a man to act as a brute towards a woman, in most cases practically defenceless. I do not believe in the theory seemed to be practically held by some, that a man at the altar purchased his wife to be his chattel or slave. Where the home belongs to him, she must, I suppose, withdraw if he illtreats her. Where it is hers, I hope it will prove to be admitted and well understood law, that he can only, to use the words of Cotton, L. J., "enter this house as a husband, to enjoy the society of his wife, or to consort with her as his wife."

This is a motion for judgment in the action. I grant it. The order will be for a perpetual injunction restraining the defendant from interfering with the plaintiff in the carrying on of the business of the hotel, or with her servants or agents, or with the business itself; and also from interfering with or removing any of the chattels belonging to the plaintiff, and used by her in the said hotel.

If, in response to any request or demand made by her to or upon him to so conduct himself in the hotel as not to interfere with the carrying on of the business, he ill-treats or abuses the plaintiff, he will, on motion for committal, receive no leniency.

The order will also be for costs.

Judgment accordingly.

The defendant, having been committed to custody under the above judgment, for having committed a breach of the injunction, subsequently made an application for his discharge, and filed an affidavit explaining and apologising for his contempt, and shewed that he was unable to pay the costs of the proceedings.

The motion came up before Osler, J. A.

On June 9, 1885, *S. Smith*, Q.C., supported the motion.
W. R. Riddell, contra.

June 16, 1885. OSLER, J. A.—On the affidavit filed on the motion, and after perusing the papers on which the order to commit the defendant was made by my brother Rose, I think I ought to discharge the defendant from further imprisonment.

The only question is, whether that should be without imposing the condition of pre-payment of the costs of the motion to commit him for contempt and of this motion.

If I were to impose that condition, I think that, however the order might in terms be disguised, I should be imprisoning the defendant for non-payment of costs for so long as the condition remained uncomplied with.

The case of *Weldon v. Weldon*, 10 P. D. p. 72, is an authority in favor of this view.

I, therefore, direct the defendant to be discharged, and order that he shall pay the plaintiff the costs of both the motions.

Order accordingly.

[CHANCERY DIVISION.]

MCGREGOR v. KEILLER ET AL. (a)

Evidence—Surveyor's field notes—Possession—Acts of occupation—Statute of limitations—R. S. O. c. 108.

To determine a disputed boundary line between two lots, the field notes of S., a land surveyor, were offered in evidence, but objected to on the ground that they were not made by S. in the execution of his duty as such surveyor :

Held, that the objection was good, and the evidence inadmissible.

The plaintiff and M., his next adjoining neighbour, in 1868, employed a surveyor to run the line between his land and that of M. The line drawn ran through a wood. For more than ten years the plaintiff was in the habit of cutting timber up to the said line, and he and the owners of the adjoining land recognized it as the division line.

Held, that this was sufficient occupation by the plaintiff to give him a good title by possession up to the said line, whether it was the correct line or not.

Harris v. Mudie, 7 A. R. 414. distinguished.

THIS action was brought by Malcolm McGregor against Frenholm Keiller, and Joshua Keiller, claiming damages for wrongfully entering the plaintiff's land, and cutting down his timber, and also claiming an injunction.

In his statement of claim the plaintiff alleged that he had for more than twelve years past continuously owned and occupied as owner in fee simple, all that part of the north half of lot 2, concession 5, south of concession A. in the township of Dunwich, in the County of Elgin, lying on the westerly side of a line surveyed and marked upon the ground as being the true line between the easterly and westerly halves of the said lot 2, by Jesse P. Ball, P. L. S., in January, 1868, and running from a post planted by him at the front or northerly boundary of the said lot southerly to the southerly boundary thereof: that on January 30th, 1882, the defendants trespassed upon a portion of his said land by cutting down the trees and timber growing and being thereon, claiming to be the

(a) This case was noted in 19 C. L. J. 277. The judgment, however, was afterwards accidentally mislaid, and has only recently been found. Hence the delay in the present report.

owners thereof adversely to himself : that a portion of the said land upon which the defendants committed the said trespasses was that portion of it which is between the said line surveyed by Jesse P. Ball, and a line to the west thereof, surveyed and marked by James A. Bell, P.L.S., in 1881, and alleged by him and the defendants to be the true line between the easterly and westerly halves of the said lot 2 : that even if the line so surveyed by the said James A. Bell be the true line between the said easterly and westerly halves of the said lot (which the plaintiff denied), he claimed to be the owner of the land upon which the said trespasses were committed by length of possession in himself ; and he claimed that it might be declared that he was entitled to the said lands, and the possession thereof as against the defendants, and that the defendants, and each of them, might be perpetually restrained from trespassing thereon, and for an account of damages caused and timber cut, and an order for payment of the same by the defendants to himself, and general relief.

The defendants denied the allegations of the plaintiff, except in so far as he said that they, the defendants, alleged the true line between the easterly and westerly halves of the said lot 2, to be the line run by James A. Bell, which they affirmed, and they said that the land in which the alleged trespasses took place was their land.

The case was tried at London, on June 16th, 1883, before Proudfoot, J.

Street, for the plaintiff. Springer's notes are not admissible as fixing the boundaries of these lots : *O'Connor v. Dunn*, 2 A. R. 247. As to the possession, I refer to *Steers v. Shaw*, 1 O. R. 26 ; *Davis v. Henderson*, 29 U. C. R. 344 ; *Shepherdson v. McCullough*, 46 U. C. R. 573. I also refer to R. S. O. ch. 146, sec. 65, p. 1289.

Meredith, Q.C., for the defendants. Springer's notes are evidence of everything contained in them : See *Taylor* on

Evid. 7th ed., p. 592. As to possession, *Harris v. Mudie*, 7 A. R. 414, positively overrules *Steers v. Shaw*, *supra*. But sufficient time has not run : R. S. O. ch. 108, sec. 5, sub-sec. 7.

July 19th, 1883. PROUDFOOT, J.—The plaintiff in 1867, bought from the Hon. M. Cameron the north-west quarter of lot number two, in the fifth concession south of concession A. in the township of Dunwich, and went into possession of it. John McBride owned the north-east quarter, and the south-east quarter of the same lot. In January, 1868, the plaintiff and McBride employed a surveyor J. P. Ball, to run the line between them. Ball ran the line, planted stakes at both ends, and made a clearly blazed line between them. Between the plaintiff and McBride, the line ran through a wood. Each exercised acts of ownership by cutting wood, &c., up to the line but not beyond it. In February, 1878, McBride procured a survey to be made by James A. Bell, and by it he placed the line thirty-seven rods to the west of the Ball line, *i. e.* placed it that distance within what the plaintiff now claims as his property, and in May, 1878, McBride seems to have threatened to take proceedings for the possession of this strip, and employed a lawyer to write to the plaintiff, but no action was ever brought. McBride sold in July, 1879, to the defendants.

I think the plaintiff is entitled to recover. both because the land in dispute forms part of the north-west quarter of the lot, and also, because, if it does not, the plaintiff has been in possession of it for more than ten years.

On August 18th, 1797, Parren Law was instructed by the Surveyor General to survey part of the townships of Aldborough, Dunwich, and Dorchester, including the locality now in question, and to lay off the lots twenty-nine chains, eighty links wide, by sixty-seven chains fifty links deep. He did not complete the survey : and on May 4th, 1803, instructions were given on behalf of the Surveyor General to William Hambly to complete the survey,

and he did so. A copy of his field notes for the first six lots in the fifth concession, Dunwich, was put in from which it appears that he put in a black ash picket on the boundary between lots one and two, and a tamarac picket between lots two and three. He does not specify the width of the lots.

When Jesse P. Ball made his survey in 1868, he found what he was told was an original post between lots eight and nine, and measuring from that to lot one, and dividing equally, he proved that each lot would be twenty-nine chains fifty-two links wide, not much different from the width that Hambly was instructed to make them. The post between lots eight and nine was not that placed by Hambly as it appeared to be only about fifteen years old. But it had the proper marks on it.

When James A. Bell made his survey in 1878 he found between lots seven and eight a birch tree that had been marked by Hambly: and the distance of that from lot one would seem to shew that the post seen by Ball, if not the post planted by Hambly between lots eight and nine was upon the site of such a post. Bell did not divide the distance measured by him equally, but according to a division made by one Springer, which gave to lot one only twenty chains sixty-six links. Had he divided equally, it would have placed the line between the plaintiff and defendants nearly, if not exactly, on the line surveyed by Ball.

On July 25th, 1821, lot one was granted to the Hon. Thomas Talbot, and described as having a width of 29 chains, 80 links.

Springer was a surveyor, who, on July 13th, 1832, was directed by the Surveyor General, in obedience to an order in council made on the application of Thomas Mercer Jones, Esq., one of the commissioners of the Canada Company, to survey and to re-examine the lots in Dunwich made over to the Canada Company, and to fix the boundaries of all such where the same had been lost.

An extract from Springer's field notes was offered in evidence, in which he states he found an old post between

lots five and six, and an old post between lots two and three, and also a post between lots one and two, which would give lot one only twenty chains sixty-six links. Springer is dead. But the evidence was objected to because the memoranda in the notes did not appear to have been made by Springer in the execution of his duty. That he was instructed merely to fix the boundaries of the Canada Company lots, and none of the six lots mentioned in the extract were shown to be Canada Company lots, nor indeed was it shown that there were any Canada Company lots in the fifth concession at all. I think the objection good, and that the evidence was inadmissible: *O'Connor v. Dunn*, 2 A. R. 247, 257.

Excluding Springer's notes, there is no substantial difference between Ball's and Bell's survey, as to the extent of line surveyed, but Bell's division according to Springer's survey cannot be supported, and I therefore think that Ball's is to preferred, and that allots the land in dispute to the plaintiff.

But I think the plaintiff is also entitled because he has been in possession of the land in dispute for more than ten years before the trespasses for which action was brought.

Ball's survey was made in January, 1868, and the trespass was in January, 1882, and the summons issued January 30th, 1882, and from the time of that survey the plaintiff occupied up to the line marked when the survey was made. He exercised ownership over it, cut timber up to the line; and the owners of the adjoining land observed this as the division line between the lots until the trespass complained of. This appears to be a sufficient occupation to bring the case within the Statute of Limitations: *Steers v. Shaw*, 1 O. R. 26.

Harris v. Mudie, 7 A. R. 414, was referred to as in effect overruling *Steers v. Shaw*, but I do not think the cases at all inconsistent. *Harris v. Mudie* was the case of mere trespassers entering wrongfully and without colour of right, while this case, as also *Steers v. Shaw* 1 O. R. 26, is the case of occupation in the honest belief of the plaintiff

that he was the owner, and for more than ten years apparently in the honest belief of McBride the owner of the adjoining lot—January 1868 to February, 1878—that this was the true dividing line between them.

I make a few extracts from the evidence to show the kind of possession the plaintiff had. Ball blazed a clear line when he surveyed. The plaintiff sold timber to McKillop up to that line, and the plaintiff has cut timber more or less every year up to the line. McBride never cut on the plaintiff's side after Ball's survey. Duncan McGregor worked for McBride in 1869, making staves on the land adjoining the plaintiff's. McBride showed him the Ball line, blazed and staked. He did not cut over that line. McKillop bought timber both from the plaintiff and McBride; made separate bargains with them in 1867; had his own time to remove it. In 1868 or 1869 he was shown this line. He took seven years to remove what he bought. He cut according to Ball's line. Jackson who assisted Ball to make survey, has helped McBride to cut timber, and Ball's line was treated as the boundary. McBride, who was examined on commission, says he took Ball's line as a guide in cutting timber. There was no dispute between him and the plaintiff, as to the boundary between the running of Ball's and the running of Bell's line.

The injunction that has been obtained will be made perpetual, and it is referred to the Master at London to take an account of the damages caused to the plaintiff by the trespasses of the defendants, and of the value of the timber cut by the defendants, and they are to pay the same forthwith after report.

The plaintiff is entitled to his costs to the hearing, the costs of taking the account are to follow the result.

A. H. F. L.

[COMMON PLEAS DIVISION.]

CHATTERTON V. CROTHERS.

Building contract—Penalty or liquidated damages.

To an action for the balance due under a building contract, the defendant set up as a defence that by the contract the plaintiff was to build the house and have the same completely finished and ready for the defendant's occupation by a named date, "under a penalty of \$5 per day," to be paid by the plaintiff to the defendant for each and every day the work on the said house remained unfinished after the said date; alleging that the work remained unfinished after the said date for a certain number of days, making an amount which the defendant claimed to deduct from the contract price.

Held, on demurrer, defence good: that the \$5, though called a penalty, were in fact liquidated damages.

Quere, whether a demurrer was the proper mode of raising the question as some damages would be recoverable.

THE statement of claim was for a sum of \$309.25, the balance due under a building contract entered into between the plaintiff and the defendant.

The statement of defence set out the contract which was under seal, whereby the plaintiff agreed to build the house, and have it built in accordance with the terms and conditions embraced in certain specifications annexed to the said agreement, and erected and completely finished and ready for the occupation by the defendant on the 1st September, 1884, under a penalty of \$5 per day, to be paid by the plaintiff to the defendant for each and every day the work on the house remained unfinished after the 1st September; claiming that the house remained unfinished until the 8th November, being for sixty days after the 1st September, whereby the plaintiff under and by virtue of the agreement became and was entitled to pay the defendant the sum of \$300, being \$5 per day for sixty days' delay after the said 1st September, 1884: that with full knowledge of the said delay, and on or about the 17th January, 1885, the plaintiff and the defendant met to have a settlement after the house was completely finished for the price of the house under the agreement, and the defen-

dant then notified the plaintiff that he would deduct from the price the sum of \$309.25, being \$300 for said delay, and \$9.25 agreed to be deducted for certain defects in said work: that a calculation having been made, the plaintiff accepted from the defendant, and defendant paid to the plaintiff, the sum of \$56.32 in full of the balance then due of the price of the house, thus allowing to the defendant the sum so agreed, &c., to be paid as a penalty and forfeiture.

To this statement of defence the plaintiff demurred on the grounds:

1. That the provision in the event of delay must be construed as a penalty, and not as liquidated damages; and that the defendant was not entitled under the agreement to deduct the sum of \$300.

2. That there is no allegation that the defendant sustained any damages by the alleged default, which would have to be the subject of a counter claim.

3. That the defendant attempts to shew that the plaintiffs accepted the sum of \$56.39 in payment of the sum of \$365.64, whereas a smaller sum can never be pleaded as paid in full satisfaction of a larger liquidated sum.

The defendant gave notice that on the argument of the demurrer he would apply for an amendment, if necessary, setting up that defendant sustained damage by reason of such default, and that the settlement was made with full knowledge thereof.

On May 12, 1885, the demurrer was argued.

Lash, Q.C., for the demurrer.

McIntyre, Q.C., contra.

The arguments sufficiently appear from the judgment.

July 7, 1885. ROSE, J.—This is a demurrer by the plaintiff to the statement of defence, setting up in answer to a claim for the amount of a building contract, a claim for liquidated damages.

In *Knowlton v. McKay*, 29 C. P. 601, the present Chief Justice of Ontario stated his doubts as to demurrer being the proper mode of raising the question, as some damages would be recoverable.

Passing this difficulty by, I have considered the question raised.

The agreement as pleaded was to build a house, and to have the same completely finished and ready for the occupation of the defendant on the 1st of September, 1884, under a penalty of \$5 per diem, to be paid by the plaintiff to the defendant for each and every day the work on the said house remained unfinished after the said 1st of September, 1884.

I have examined the following authorities, amongst others cited: *Gilmour v. Hall*, 10 U. C. R. 309; *McPhee v. Wilson*, 25 U. C. R. 169; *Archbold v. Wilson*, 32 U. C. R. 590; *Hamilton v. Moore*, 33 U. C. R. 100; *Scott v. Dent*, 38 U. C. R. 30; *Knowlton v. McKay*, 29 C. P. 601; *Craig v. Dillon*, 6 A. R. 116.

It is clear the use of the phrase "penalty" or "liquidated damages," does not decide the question.

I am unable to distinguish this case from *Gilmour v. Hall*, 10 U. C. R. 309. I think Mr. Lash hardly argued that there was a distinction, but urged that *Archbold v. Wilson*, 32 U. C. R. 590, was in conflict.

In *Archbold v. Wilson*, the present Chief Justice of the Queen's Bench Division presided at the trial, and in term adhered to his opinion, that the claim was for a penalty.

Richards, C. J., was absent, and Morrison, J., was of the opinion that the claim was for liquidated damages. The rule therefore dropped.

In that case the contract was for two houses, to be ready for lathing by the 10th of October, for the painter by the 10th of November, and fully completed by the 24th of November, under a penalty of \$20 a week as liquidated damages for every week beyond the time.

Although in the statement of the case it is said that the learned Judge at the trial held the claim to be for a penalty

as it applied to two houses, it seems to me he must have considered it in the light of work on two houses to be done in different stages at different times, and one penalty provided, because *Gilmour v. Hall*, 10 U. C. R. 309, was cited, though not referred to in the judgment of Morrison, J.

The difficulty might be to say whether the claim would be \$20 for each or both houses a week ; or whether it was \$20 a week after the 10th of October, another \$20 after the 10th of November, and a further \$20 after the 24th of November. However that may have been, the facts in that case are not the same as here.

I do not find *Archbold v. Wilson*, 32 U. C. R. 590, which was decided in Easter Term, 1872, referred to in *Hamilton v. Moore*, 33 U. C. R. 100, decided in the following Michaelmas term, and in which the same learned Judge before whom the former case was tried, delivered a strong judgment, holding the claim to be for liquidated damages in a case no stronger for the plaintiff, so far as I can see, than the present one, unless an agreement to complete a building can be distinguished from an agreement to do certain iron work on a building; and I do not think on the cases it can be distinguished.

There was another question raised by the decision as to the right of the defendant to plead acceptance of a smaller sum in payment of a larger.

The action was begun prior to March 30th, 1885, the day of the coming into force of 48 Vic. ch. 13, sec. 6, (O.)

This question disappears, if I am correct in the view I have taken of the first, as the pleadings show payment of the balance after deducting the liquidated damages.

The demurrer must be overruled, with costs in the cause in any event to the defendant.

Judgment for defendant.

[COMMON PLEAS DIVISION.]

WILSON V. WOODS.

Slander—Justification—Restriction to mitigation of damages—Pleading.

To an action of slander, the defendant set up as a defence facts which amounted to a justification, but restricted their effect to the mitigation of the damages :

Held, this constituted a good defence.

THE statement of claim alleged : 1. On or about, &c., that the defendant in a conversation with one Ezra Rathbun and others at the Exhibition grounds in the city of London, falsely and maliciously spoke and published the words following, that is to say, setting out the slander complained of, which, omitting some of the explanatory averments, was as follows: "He (plaintiff) has robbed him (Isaac Saul) out of the whole affair, and the only thing he could do would be to send him to the penitentiary, meaning thereby that the plaintiff had feloniously stolen or embezzled certain moneys from the said Isaac Saul."

The second clause in the statement of claim set out that: "The plaintiff is a solicitor and, as such solicitor, was retained and instructed by one Isaac Saul to let certain farming lands and collect the rents and profits thereof for and on behalf of the said Isaac Saul; and the defendant * * falsely and maliciously spoke and published of the plaintiff in relation to his said business. * * 'He (meaning the said Isaac Saul) could not get anything from Mr. Wilson (meaning the plaintiff) who has been collecting the rents for Mr. Saul; he has never made any returns to Mr. Saul; he has used all the money himself; he has robbed him out of the whole affair, and the only thing he could do would be to send him to the penitentiary', meaning thereby that the plaintiff was guilty of fraudulent and felonious conduct in his said business."

The defendant denied all the allegations contained in the plaintiff's statement of claim, and in the second paragraph said, "If the plaintiff establishes that the defendant spoke

and published of the plaintiff the words charged or any of them, the defendant in mitigation of damages says that Isaac Saul, the defendant's brother-in-law about fifteen years ago departed from this Province to live in British Columbia, and left the plaintiff in full charge and control of all his real and personal estate in this Province: that during all that time the said Saul was unable to get any satisfactory statement of his affairs from the plaintiff: that on or about the month of July last past the defendant's sister, wife of the said Saul, returned to the Province with instructions from her husband, the said Saul, to get a statement of his affairs from the said plaintiff and effect a settlement with him: that for the space of eight weeks the said Mrs. Saul constantly endeavoured to get a statement from the plaintiff of her husband's affairs, but without avail; and the said Isaac Saul was compelled, at great inconvenience and expense, to return to this Province for the purpose of compelling the said plaintiff to make a statement of his said affairs and of the money accrued and disbursed by him during the said time for and on behalf of the said Saul: that upon his return the said Saul found that the said plaintiff had received from one James Arnold, a tenant of the said Saul, the sum of \$600, or thereabouts, for which the defendant was unable to account; and also had received other sums of money which he had converted to his own use; and the said Saul has never been able to obtain from the plaintiff payment of the said sums of money so received by him."

To this the plaintiff demurred on the ground that it disclosed no defence.

Clement, for the demurrer.

Aylesworth, contra.

July 9, 1885. ROSE, J.—This is a demurrer to a clause in the statement of defence to an action for slander.

As the demurrer admits all the statements of fact, it will be necessary to consider what effect such admissions

have upon the plaintiff's case, and whether the plaintiff has not thereby admitted the truth of all the statements alleged by him to have been made by the defendant.

In the first clause or paragraph of the statement of claim, the statements alleged are: "He has robbed him out of the whole affair." "The only thing he could do would be to send him to the penitentiary;" the inuendo, theft or embezzlement.

If he has received the rents, refused to account, appropriated them to his own use, and left his brother-in-law to find out the misappropriations by personal investigation, has the plaintiff not robbed his brother-in-law out of the whole affair, using the word robbery in its colloquial and not its technical sense, and ought he not to be sent to the penitentiary? Would not a jury on such evidence be bound to find him guilty of larceny, or more correctly, embezzlement?

Take the second paragraph. Is it not by such admissions proven that Saul "could not get anything from Mr. Wilson who" &c.: that the plaintiff "has never made any return to Mr. Saul:" "has used all the money himself:" "has robbed him (meaning the said Isaac Saul) out of the whole affair," and if so would not the only proper thing for Saul to do be "to send him to the Penitentiary," and would not the plaintiff be "guilty of fraudulent and felonious conduct in his said business?"

Mr. *Harris* on the Principles of the Criminal Law, 3rd ed., p. 223, has stated the requisite evidence to shew embezzlement; and, on p. 236, it is said: "But where it is the prisoner's duty, at stated times, to account for and pay over to his employer the money received during those intervals, his wilfully omitting to do so is embezzlement, and equivalent to a denial of the receipt of them": citing *Regina v. Jackson*, 1 C. & K. 384.

Does not the plaintiff admit quite sufficient to warrant a verdict of guilty of embezzlement?

The introduction of the words "in mitigation of damages" into the statement of defence has given ground

for argument as to the effect of the pleading. Without them I should have thought the defendant had intended to set out facts shewing the truth of the statements, *i.e.*, had pleaded justification.

I cannot see that the introduction of these words entitles the plaintiff to have the pleading struck out of the record.

It seems to be admitted or assumed in *Scott v. Sampson*, 9 Q. B. D. 491, that damages may now be pleaded to.

I refer to the judgment of Cave, J., where speaking of a defendant being allowed to give evidence of plaintiff's reputation to shew that he is not a man who has a right to ask large damages for the injury of a worthless thing, said at p. 503: "It is said that the admission of such evidence will be a hardship upon the plaintiff, who may not be prepared to rebut it; and under the former practice, where the damages could not be pleaded to, and general evidence of bad character was allowed to be given under a plea of not guilty, there was something in this objection, which, however, is removed under the present system of pleading, which requires that all the material facts shall be pleaded, and a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character in coming prepared with friends who have known him to prove that his reputation has been good."

Matthew, J., held, at p. 495, that even if the evidence were material, *i. e.*, in reduction of damages, it was properly rejected, as "as there had been no notice upon the statement of defence in this case that the evidence would be offered at the trial."

And Cave, J., at p. 507, said: "The defendant proposed to prove certain facts which he alleged were material, but these facts were not stated or referred to in the pleadings as required by Order xix. R. 4, and it appears to me that on that ground their rejection might have been supported, had they been material, which, however, as I have said, I think they were not."

The result of *Scott v. Sampson*, seem to me to be, that if a defendant is at liberty to offer at the trial evidence which, although not constituting a defence to the action, may afford ground for the reduction or mitigation of the damages, such as in an action of libel and slander evidence of the plaintiff's bad reputation, evidence shewing want of malice, and other like, he is not only at liberty, but it is his duty under Rule 128 O. J. A., corresponding to Order 19, Rule 4, in England, to give notice upon the record of his intention to do so.

In *Livingston v. Trout*, 9 O. R. 488, I had before me on demurrer an example of a statement of defence containing notice of facts which I thought ought to remain on the record as tending in some degree to rebut malice, or rather as explaining a circumstance which, without explanation, might have been some evidence of malice.

I am of the opinion therefore that the paragraph demurred to is not objectionable. 1. Because it sets out facts which amount to a justification: and 2. If the defendant entitled to plead such facts as a justification chooses to restrict their effect to the mitigation of the damages he may do so, and the plaintiff cannot complain.

The demurrer must be overruled, with costs in the cause to the defendant in any event.

Judgment for the defendant.

[COMMON PLEAS DIVISION.]

THE STEVENS, TURNER, AND BURNS FOUNDRY AND
GENERAL MANUFACTURING COMPANY, LIMITED v.
SAMUEL BARFOOT.

*Fixtures—Chattel Mortgage—Affidavit of bona fides—Sale of goods—R.S.O.
ch. 119, secs. 1, 2.*

The maxim *quicquid plantatur solo, solo cedit* has no weight or application when the land to which the chattels are affixed, is that of a stranger, and not of the party affixing them, and in such case the wrong-doer can neither rightfully nor wrongfully give to the owner of the land a title to the chattels.

The plaintiffs sold a portable saw-mill, engine, boiler, &c., to O. & K., but the property and right of possession were not to pass until payment of the price. O. & K. used the mill, &c., as a portable mill, for which they were designed, and then under the belief that they were the purchasers of certain land from the Canada Company through the company's agent, erected the mill, &c., thereon, so as to assume a permanent character. It appeared, however, that the agent had no power to sell, and the land was afterwards sold to the defendant. On the 12th November, 1883, prior to the defendant's purchase, the defendant took from O. & K. a mortgage on the land to secure an alleged indebtedness to him; and on the 15th November a chattel mortgage on the above chattels. The latter mortgage did not state the amount of the indebtedness; and the affidavit of *bona fides* was equally defective, as it merely stated that the mortgagors "are fully indebted to me," the mortgagee, "in a large sum of money," no sum being mentioned. On the 27th November, on the boiler being exchanged for another one, O. & K. gave plaintiffs a chattel mortgage thereon. There was a misdescription therein as to the number of flues of the boiler, and as to the land on which it was situated. The defendant having claimed the mill, &c., as against the plaintiffs.

Held, that the plaintiffs were entitled to recover damages not only for the goods owned by them, but also for the boiler under their chattel mortgage, for though it was subsequent to the defendant's, the latter was void as against the plaintiffs, the amount of indebtedness existing or created by the mortgage not being mentioned therein, and in the affidavit of *bona fides* as required by the first and second sections of R. S. O. ch. 119.

Held, also, that parol evidence was admissible to shew that the boiler in question was the one mortgaged.

THIS was an action tried before Cameron, C. J., without a jury, at London, at the Spring Assizes of 1885.

McGee (of London) for the plaintiffs.

Wilson (of Chatham) for the defendants.

The plaintiffs' cause of action was the alleged conversion by the defendant of one portable twenty-five horse power engine; one portable No. 2 saw mill and attachments; one raincounter, and a portable fifty horse power boiler.

All the articles, except the boiler, were sold by the plaintiffs to Messrs. Overton & Kennedy, who, after using them for sometime as a portable saw mill for which they were designed, removed them to a lot of land the title to which was vested in the Canada Company, and there erected them so as to assume a stationary and not portable character.

The goods were sold to Overton & Kennedy upon the terms that the title, ownership, and right of possession should not pass from the plaintiffs to the said Overton & Kennedy until certain notes which they had given on account of the price should be fully paid.

The boiler was obtained from Doty & Son by Overton & Kennedy in exchange for a boiler which they purchased with the engine and machinery from the plaintiffs. The plaintiffs seized their own boiler when Overton & Kennedy attempted to make the exchange; and the latter then agreed, on the plaintiffs consenting to the exchange, to give a chattel mortgage on the new boiler. The mortgage was given on the 27th November, 1883, and therein the boiler was described as one tubular boiler with seventy-nine inch flues, twelve feet long, fifty-four inches in diameter, and fifty horse power, made by John Doty & Son, situate on lot No. 16 in 9th concession of the township of Tilbury West. The description was erroneous in respect to the number of flues and the lot on which it was situate, it being in fact on lot 16 in the 8th concession.

Overton & Kennedy put up buildings on the south half of the said lot 16, in the 8th concession of the said township, and put in the machinery of the saw mill that they had used before as a portable mill, under the impression that they were entitled to become the owners of the land by reason of an agreement entered into by them with an agent of the Canada Company for the purchase of the same. It turned out the agent was not empowered to sell, and the agreement made by him was not recognized by the company, who subsequently sold the land to the defendant.

Previous to the defendant becoming the purchaser of the land, he took from Overton & Kennedy a mortgage on the land, bearing date 12th November, 1883, to secure an alleged large indebtedness from them to the defendant. And afterwards, on the 15th day of November, 1883, the defendant took from them a chattel mortgage upon property described as one mill and machinery; one frame house twenty feet by twenty-eight feet, and kitchen thereto annexed twenty-four feet by sixteen feet, one story and a half high, with brick chimneys; one frame stable forty feet by twenty feet, fifteen feet high; and other property, not necessary to be enumerated, situate on the south half of lot 16 in the 8th concession of the said township of Tilbury West. This mortgage contained a proviso making the same void if the mortgagors should well and truly pay to the mortgagee "*the full sum of the indebtedness now existing or hereafter to be contracted as aforesaid,*" with interest at the rate of twelve per cent. per annum, the said indebtedness to become due and payable on or before the expiration of one year from the date thereof. The mortgage was expressed to be made in consideration of the premises and of \$1.00 paid by the mortgagee to the mortgagors, and contained a recital: "Whereas the said mortgagors are largely liable and indebted to the said mortgagee; and whereas the said mortgagee has demanded further security for the said indebtedness, and for further advances which may be hereafter made by the said mortgagee to the said mortgagors; and whereas the said mortgagors have agreed to execute these presents as collateral security for 'he said indebtedness, and any further advances hereafter to be made as aforesaid."

The affidavit of *bona fides* made by the mortgagee set forth that the mortgagors in the mortgage mentioned "are justly indebted to me, this deponent, in a large sum of money; and it is expressly understood and agreed between the said mortgagors and this deponent that the said mortgage is to be a continuing collateral security for any and all indebtedness now due or hereafter incurred by the said

mortgagors to me this deponent; and that the said bill of sale by way of mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said bill of sale by way of mortgage against the creditors of the said William Kennedy and George Overton, the mortgagors therein named, or of preventing the creditors of such mortgagors from obtaining payment of any claim against them."

The mortgage to the plaintiffs and that to the defendant were duly filed in the office of the clerk of the County Court in the county of Essex.

The plaintiffs had never been paid for the goods.

The plaintiffs duly proved a demand of the engine, boiler, and machinery, and a refusal by the defendant to deliver them up.

The defendant claimed the right to hold all the articles as fixtures affixed to the said lot of land in respect of the conveyance of the land by the Canada Company to him, and also by reason of his chattel mortgage; and contended that the plaintiffs' mortgage on the boiler was void by reason of the erroneous description given therein of the said boiler.

The learned Chief Justice delivered the following judgment:

August 21, 1885.—CAMERON, C. J.—The first question to be determined is, what is the legal effect of the mortgagors having put up their mill and machinery on the land of the Canada Company. If the mortgagors' intention in the act of erection alone is to be considered, I should have little hesitation in finding that in putting up their saw mill they did so with the intention of permanently improving the land; and so, as between them and the defendant, under the mortgage of the land to him, the engine, boiler, and machinery would pass as fixtures. But this is not all that is to be considered in the determination of the rights of

the plaintiffs and defendant. The effect of the maxim *quicquid plantatur solo, solo cedit*, has recently received a good deal of attention.

In *Joseph Hall Manufacturing Co. v. Hazlett*, 8 O. R. 465, the seller of machinery under an agreement similar to the one in question here, was held entitled to recover against the owner of the land to which the machinery had been affixed by a tenant in a manner undistinguishable from the way in which the engine and boiler were attached in the present case. The lessee after purchasing the machinery put it in a mill he built on leased land. The term became forfeited, and the lessor entered for the alleged forfeiture and demised again the land with the machinery upon it to a third party.

The authorities were also very fully reviewed by Mr. Justice Proudfoot in *Thomas v. Inglis*, 7 O. R. 588, where the decision is strongly in favour of the plaintiffs' right to maintain this action.

It seems to me the maxim can have no weight or application where the property affixed is that of a stranger, and not of the party affixing it. When a stranger owns the goods, the wrongdoer can neither rightfully nor wrongfully give a title to such goods to the owner of the soil by affixing them so as to become part of the soil.

This would appear to be only common sense as well as common justice ; and if the owner of the soil seeks to retain that which has been improperly affixed to his land by one who had not the legal title to the thing so affixed, he must pay for it.

The taking of the chattel mortgage by the defendant from Overton & Kennedy, though they had previously taken a mortgage of the land, makes this case stronger against the defendant than it would be against the Canada Company, who, I am of opinion, could not be allowed to assert dominion over the property in question without making compensation to the plaintiffs.

The title to the boiler stands upon somewhat different footing. The defendant's mortgage precedes the plaintiffs'

in point of time, and, if not defective under the provisions of the Chattel Mortgage Act, R. S. O. ch. 119, it would give to the defendant a stronger title than the plaintiffs.

The plaintiffs allege it to be invalid against them as subsequent mortgagees by reason of a defect in the affidavit of *bona fides*.

The second section of the Act requires that the mortgagee's affidavit shall state that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned therein. The mortgage of the defendant does not state the amount of the indebtedness, and the affidavit is not more definite. If the mortgage does not state an indebtedness it would not be possible for the mortgagee's affidavit to comply with the statute; and if the affidavit does not meet the requirements of the Act, under sec 4, the mortgage is made void.

That section declares that in case such mortgage and affidavits are not registered as provided, the mortgage shall be absolutely null and void.

So reading the first and second sections together, it is clear the mortgage must mention the amount of indebtedness existing or created by the mortgage. For while the first section says nothing about amount, the second imperatively requires the statement in the affidavit of the *sum* mentioned in the mortgage.

I do not quite see why a mortgage might not be given to secure the return of a horse, tent, or valuable painting; and yet I do not see how a mortgage executed for that purpose should be required to mention any sum. If such a case should arise, it may be questioned whether the mortgage would come within the operation of the Act at all; but certainly a want of notice of such an incumbrance would be as prejudicial to a person dealing with a mortgagor as the want of the statement of a precise sum in the present case. But a present indebtedness must consist of a precise sum, and where the circumstances are such as to make it possible for the terms of the Act to be complied with, its requirements must be observed, or the nullity of

the instrument pronounced by the statute must follow their non-observance.

I therefore must hold that the defendant's mortgage as against the plaintiffs is void, for I do not think that the error in the description in the plaintiffs' mortgage invalidates it.

There is no doubt, as matter of fact, the boiler in question was the one mortgaged to the plaintiffs; and I think it was competent, as between the mortgagor and mortgagees, to shew by extrinsic evidence what property it was the parties intended to mortgage. The defendant is not in a better position in this respect than the mortgagor himself.

The learned Chief Justice then considered the question of the amount of damages, which he assessed at \$1,592.50.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

McLEAN v. SHIELDS AND LEACOCK.

Foreign judgment—Judgment against non-resident and without notice—Validity of—Motion to set same aside in foreign Court—Effect of.

To an action on a judgment recovered in the Court of Queen's Bench Manitoba, the defendant set up as a defence that he was not at or during the time proceedings were taken to recover the said alleged judgment, nor has he since been a resident of or domiciled within the said Province of Manitoba, and was not served with any process or notice of the said action, nor had he any opportunity of appearing in said action and defending same; and the said judgment was obtained in his absence and without his knowledge.

Held, following *Schibsy v. Westenholz*, L. R. 6 Q. B. 155, a good defence.

The defendant on hearing of the judgment having been entered against him, instructed counsel to move to set same aside; but the application was refused on the ground that it was too late.

Held, that this did not preclude defendant from disputing the validity of the judgment on the action thereon in this Province.

ACTION on a judgment of the Court of Queen's Bench of Manitoba; and also on the same cause of action as was before that Court.

The defendant Leacock had allowed judgment to go against him, so the only question at the trial was the liability of the defendant Shields.

The statement of claim set out that the plaintiff recovered against the defendant by the judgment of the Court of Queen's Bench of Manitoba the sum of \$1,743.49, which was still unpaid. It then set out that on the 24th December, 1881, McLean, Moran & Co., by their certain bill of exchange now over due, directed to the defendants (meaning Shields & Leacock) by the firm name aforesaid (Shields & Leacock), requested the defendants to pay to the order of the plaintiff, on or about the 1st March, 1882, the sum of \$405.25; and the defendant accepted the said bill in the words following, that is to say: "No. 5. We will keep the sum of \$405.25 from the first estimate of McLean, Moran & Co., (meaning said drawers of said bill) as requested above, provided they have done sufficient to earn that sum;" and the defendants afterwards

received an estimate of said McLean, Moran & Co., and the said McLean, Moran & Co., did sufficient work to earn the said sum of \$405.25, and defendants received and held money of said McLean, Moran & Co., sufficient to pay said sum. And all things happened, and all times elapsed, and all conditions were fulfilled necessary to entitle the plaintiff to maintain this action, but the defendants did not pay the said bill.

There was a similar statement with respect to another similar bill and acceptance for \$605.

There was then an allegation that the plaintiff at the request of the defendants, paid and advanced two sums of money to McLean, Moran & Co.

These were the said sums; and there was no evidence to sustain the allegation, as no such sums, or any other, were so paid.

To this statement of claim Shields pleaded:

1. That there was no such firm as Shields & Leacock.
2. A denial of the allegations contained in the second paragraph (that is the judgment.)

3. "The defendant further says that he was not at or during the time the proceedings were being taken to recover the said alleged judgment, nor has he since been resident of, or domiciled within the said province of Manitoba, and he was not served with any process or notice of the said action, nor had he any notice whatsoever of proceedings in the said action, nor had he any opportunity of appearing in the said action and defending the same; and the said alleged judgment was obtained in his absence, and without his knowledge."

There were several other grounds of defence, but it is unnecessary to set them out.

The cause was tried before Wilson, C. J., without a jury, at Toronto, at the Spring Assizes of 1885.

At the trial the learned Chief Justice expressed the following opinion: "I think, perhaps, it will be better to enter a verdict for the plaintiff on the first count" (that is, on the judgment). "I do not think he is entitled to

judgment on the second count" (that is, on the consideration on which that judgment had been obtained). "I think Mr. Shields's evidence explains the whole matter very strongly. I think it does not form a partnership between him and Leacock. It was in point of fact only a temporary union of the two."

In conclusion his Lordship said: "I am inclined to give a verdict for the plaintiff on the first count; and for the defendant on the others.

"In order to save two motions in Term I enter judgment for the defendant Shields."

The learned Judge accordingly entered judgment for the defendant Shields.

In Easter sittings, *G. H. Watson* moved on notice to set aside the judgment, entered for the defendant Shields, and to enter judgment for the plaintiff, on the ground that the said judgment, in favour of the said defendant, is contrary to law and evidence, and that the plaintiff is entitled to judgment against the defendant John Shields for the full amount of his claim, as well on the judgment set out in the statement of claim as on the original cause of action also therein set out.

During the same sittings, June 4, 1885, *G. H. Watson* supported the motion. The production of the exemplification of the foreign judgment under the seal of the Court of Queen's Bench of Manitoba is conclusive evidence of the recovery of such judgment, and the defendant is bound by it: *R. S. O. ch. 62, sec. 31*. There is evidence that the solicitors who acted for the defendant had authority to act for him; and even if the solicitors had no authority so to act, the defendant's remedy must be against the solicitors: *Piggott on Foreign Judgments*, 2nd ed., 161-3; *Malony v. Gibbons*, 2 Camp. 502; *Russell v. Smythe*, 9 M. & W. 810, 819; *Turcotte v. Dawson*, 30 C. P. 23; *Tilton v. McKay*, 24 C. P. 94; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Henderson v. Henderson*, 3 Hare 100; *Reimers v. Druce*, 26 L. J. N. S. Ch. 196. [CAMERON, C. J.—The cases in which it

has been held that the solicitor must be looked to, are cases in which the solicitor was the solicitor of the Court in which the judgment was recovered, and they do not apply to the case where the judgment is attempted to be enforced in a foreign Court.] The cases would seem to go far enough to include the present case. The defendant, however, by moving the Court in Manitoba to have the judgment set aside is precluded from now objecting that it was not properly recovered.

Tilt, Q.C., contra. The exemplification of the judgment is not conclusive. The circumstances set out in the third plea constitute a good defence: B. & L. Prec., 3rd ed., 623; *Reynolds v. Fenton*, 3 C. B. 187; *Vallee v. Dumergue*, 4 Ex. 200; *Meeus v. Thelluson*, 8 Ex. 638. There is no evidence to shew that the solicitors had any authority to act for Shields. Leacock had no express authority to act for him and to retain solicitors to enter an appearance for him, and he clearly had no implied authority. There is no evidence to shew that any partnership existed between them; and the alleged authority given by Leacock was not to enter an appearance for the firm, but to enter an appearance for himself individually and also for Shields. But even if there was a partnership one partner has no authority to retain a solicitor to enter an appearance for his co-partner: *Archbold's Practice*, 13 ed., vol. i., p. 87. The application made to set aside the judgment does not preclude the defendant from now objecting to the validity of the judgment. There was no contract proved on which to found the judgment.

September 5, 1885. GALT, J.—At the trial a good deal of discussion took place as to the admissibility of evidence taken under a commission owing to certain irregularities alleged; but as our judgment does not in any way depend on them, it is unnecessary to refer to them, nor was any great importance attached to them on the argument before us.

The principal contention of Mr. Watson was, that the judgment obtained in Manitoba was binding on defendant, and that this Court was concluded by it.

From the evidence it appeared that when the suit in Manitoba was commenced, an appearance was entered for the defendant Shields by a firm of solicitors acting under instructions from defendant Leacock; but there was no evidence that this was sanctioned by him. He expressly denies having given authority, or that he had any notice or knowledge whatever of the suit having been commenced. It is true, also, that when he subsequently heard of the judgment having been obtained he instructed counsel to apply to set it aside; but the application was refused, on the ground that the application was too late.

Mr. Watson contended that this application having been made the defendant is now concluded from disputing the jurisdiction.

The case of *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, is an authority opposed to that view. It was there held that a foreign judgment obtained by the fraud of a party to the suit in the foreign Court, cannot be afterwards enforced by him in an action brought in an English Court, even although the question whether the fraud had been perpetrated was investigated in the foreign Court; and it was there decided that the fraud had not been committed.

It is true there is in this case no allegation that any fraud was committed by the plaintiff, nor was he in any way responsible for the act of Leacock in authorizing an appearance to be entered for Shields. But what I cite it for is to show that where a fraud has been committed by which a foreign judgment has been obtained, a defendant who actually contested the question in the foreign Court, is not precluded from afterwards contesting his liability on the judgment so obtained in an action brought to enforce it.

In the present case the judgment had been obtained against Shields on what appeared to be a regular suit to which he had entered an appearance. The suit had gone by

default and was a standing judgment against him, and, of course, binding on him in Manitoba. Surely it was natural and proper for him to apply to the Court to set that judgment aside, and his so doing does not, in my opinion, preclude him from contesting his liability when steps are taken by the plaintiff, not to enforce the judgment in Manitoba, but to obtain a further judgment in Ontario based thereon.

The question then remains, is the third plea a good defence to the action; and, in my opinion, it is.

For convenience in comparing it with the plea in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, I set it out: "The defendant further says that he was not at or during the time the proceedings were being taken to recover the said alleged judgment, nor has he since been, a resident of or domiciled within the said Province of Manitoba, and he was not served with any process or notice of the said action, nor had he any notice whatever of any proceedings in said action, nor had he any opportunity of appearing in the said action and defending the same; and the said judgment was obtained in his absence and without his knowledge."

In *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, it was: "3rd. That the action was commenced according to the laws then and still in force in the Empire of France by process and summons, and that the defendants were not, nor were any of them, at the time of the commencement thereof, or at any time previous to the recovery of the judgment resident or domiciled within the jurisdiction of the Court, nor are the defendants, nor any of them, natives of the Empire of France; and they were not at any time before the recovery of the judgment served with any process or summons in the action, nor did the defendants appear in the action, nor had they, before the recovery of the judgment, any notice or knowledge of any process or summons, or of any proceedings in the action, or any opportunity of defending themselves therein."

It appears to me these pleas are substantially the same.

At the trial of the English case the jury found the defendants had notice of the proceedings in France, and had opportunity to enter an appearance, but did not do so, and judgment went against them in consequence.

In the case now before us an appearance was entered for defendant, but without his knowledge; and consequently he had no opportunity of making any defence.

The English Queen's Bench directed judgment for defendant; and upon the principles therein stated, in my opinion, judgment should be in favour of the defendant.

The case of *Fowler v. Vail*, 27 C. P. 41, 4 A. R. 267, contains a reference to all the English cases. This also is in favour of defendant.

The learned Judge has found the other issues in favour of defendant. But as it is manifest the plaintiff has a good cause of action on the merits, although on the evidence at present before us not as against Shields, and that at the last trial he relied on the judgment without going into the facts, we think he should have a new trial as respects the original consideration—not on the judgment—if he so elects upon payment of costs of the last trial, with the costs of the motion now before us; if he does not so elect, the motion will be dismissed, with costs. The plaintiff to make his election within a month.

CAMERON, C. J., and ROSE, J., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

CARSON V. VEITCH.

Assessment and taxes—Right to deduct taxes from rent—Assessment roll—Sufficiency of description of property in—Demand—Distress—Laches—R. S. O. ch. 180, secs. 12, 21, 57, 100.

Certain property in the city of Toronto had been owned by B., and on his death in 1884, intestate, and without known heirs, defendant entered and leased the property to the plaintiff, the defendant agreeing to pay the taxes. In 1884, the taxes assessed for 1883 not having been paid, a distress was entered therefor, when the plaintiff paid them and claimed to deduct them from the rent. The assessment for 1883, was against B. as owner, of which he received notice, and he was similarly assessed and received notice for the two prior years. In the assessment roll the name of the street and property was given, but not the number of the house or lot, except an arbitrary number adopted by the assessment department for their convenience, and without information from the department the lot could not be discovered.

Held, that, under sec. 21 of the Assessment Act, R. S. O. ch. 180, which, in the absence of an agreement to the contrary, authorizes the tenant to deduct the taxes paid by him from his rent, only does so when he could be compelled to pay the same; and as, following *Chamberlain v. Turner*, 31 C. P. 490, there appeared to be no valid demand here, there was no right to collect the taxes, and therefore no right to deduct the same.

Quare, whether the description in the assessment roll was sufficient; but under the circumstances, and in view of the provisions of sec. 57 validating the roll as finally passed by the Court of Revision, B. probably could not have raised this objection to a distress or suit for the taxes.

Semble, where there is a sufficient distress on the property, and the municipality by its own laches puts it out of its power to distrain, sec. 100 does not avail to give the right to collect by action.

THIS was an action for damages arising from an alleged illegal distress, the plaintiff claiming there was no rent due at the time of seizure.

The cause was tried before Cameron, C. J., and a jury, at Toronto, at the Winter Assizes of 1885.

The premises in question had been owned and in the occupation of a man named John Black. On Black's death, intestate and without leaving any known heirs, on the 25th January, 1884, the defendant Veitch entered and took possession, and on 7th March, 1884, leased the premises to the plaintiff. The defendant having distrained for the rent, this action was brought. The property for the year 1883, was assessed against Black as

owner, and there was evidence given to show that Black had received a notice of assessment for that year, and that he had been similarly assessed and had received notice of assessment for the two years prior thereto.

The agreement between the plaintiff and defendant provided that the defendant should pay the taxes; and there was no other agreement as to them.

The plaintiff's contention was, that the rent had been paid by setting off an amount paid by him for taxes due for 1883, under distress therefor, he being tenant of the defendant of the premises in question. The distress was made on the 8th May, 1884.

The defendant's contention was, that owing to certain irregularities in the assessment, and for other reasons, he was not liable to pay the taxes, and hence the plaintiff was not entitled to deduct them from the rent under sec. 21 of the Assessment Act, R. S. O. ch. 180, which provides that "any occupant may deduct from his rent any taxes paid by him, if the same could also have been recovered from the owner or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary."

The judgment of the learned Chief Justice was as follows:

"The jury, in answer to questions put to them, say the demand for taxes was made as required by the Assessment Act: that the property was assessed so as to make it appear from the assessment roll that it was the property in question that was assessed: that the plaintiff paid the taxes *bond fide*, and before the defendant distrained for rent; and they find the damages sustained by the plaintiff, by reason of the trespasses and wrongs in the plaintiff's statement of claim mentioned, amount to \$75, goods not sold to be returned to the plaintiff; and, as against the plaintiff, that the defendant Veitch did own the premises within mentioned.

"I therefore direct that judgment be entered for the plaintiff for the said sum of \$75 damages, with costs, to be taxed on the County Court scale."

In Hilary sittings, February 5, 1885, *Bigelow* obtained an order *nisi* to set aside the findings and judgment for the plaintiff, and enter a nonsuit or judgment for the defendant, on the grounds:

1. That there was no sufficient evidence of a proper assessment.

2. That there was no evidence of any demand of payment of the arrears of taxes within the statute, and that the leaving by the collector of the assessment papers upon the premises is not a sufficient notice. (query, demand?)

3. That the demand must be made of the person against whom the ultimate proceedings are taken.

4. That there was no evidence that the defendant Veitch had at the time of the alleged demand any interest in the property in question; and that there was no evidence of any notice to or demand upon him for payment of the taxes, or that he was in any way responsible for them; and if he was not they could not be set off against the rent payable by the plaintiff to the defendant Veitch.

5. Or why the verdict and judgment should not be set aside and a new trial had between the parties, on the grounds (1) that the same is contrary to law and evidence, and the weight of evidence; and (2) that the learned Judge submitted to the jury the question whether the assessment was conformable to the Assessment Act; and (3) on the grounds hereinbefore stated.

During Easter Sittings, May 26, 1885, *Bigelow* supported the order and referred to: *The Assessment Act*, R. S. O. ch. 180, secs. 12, 21, 93, 100, and 103; *Warne v. Coulter*, 25 U. C. R. 177; *Great Western R. W. Co. v. Rogers*, 29 U. C. R. 245, 252. ¶[*ROSE, J.*, referred to *Chamberlain v. Turner*, 31 C. P. 460.] *Nickle v. Douglas*, 35 U. C. R. 126, 37 U. C. R. 51.

J. Reeve, contra, referred to: *Harrison's Mun. Manual* 4th ed., secs. 21, 47, pp. 631, 666, and cases there referred to; *Anglin v. Minis*, 18 C. P. 170.

September 5, 1885. ROSE, J.—The objection raised to the mode of assessment was, that there was no sufficient description of the lot.

Section 12 provides that, amongst other things, must appear "Column 8.—Number of concession, name of street, or other designation of the local division in which the real property lies. Column 9.—Number of lot, house, &c., in such division. Column 10.—Number of acres, or other measure showing the extent of the property."

In this case the name of the street was given and the property, but the numbers of the lot or house was not given.

An arbitrary mode of numbering has been adopted which no doubt is convenient for the civic officials, and under which this property was numbered 1843; but, as stated by the assessment commissioner in reply to a question put by the learned Chief Justice, if one went to the commissioners office to look for the property in the roll and was handed the book to find out what the property was, he would be unable to do so without making enquiries.

It was stated that by reference to the roll he could find that the previously assessed property was No. 133; but there was nothing stated on the roll to shew that this property was adjoining 133.

It may perhaps be fairly inferred from the evidence that Black, who was assessed as owner prior to the entry by the defendant, had received notice of assessment similar in form for the three years immediately preceding the assessment in question.

In view of these facts and the provisions of sec. 57 validating the roll as finally passed by the Court of Revision, it may be that Black could not have successfully raised this objection in answer to a distress or suit to recover the taxes.

I do not find it necessary to express a decided opinion, but it seems to me it would be wise for the municipality to describe properties as required by the statute, and so avoid the difficulty.

While not at all clear that the objection is not well taken, I prefer to rest my judgment on what seems to me clear ground.

The 21st section seems to me to entitle the occupant to deduct taxes from rent when they could have been collected from the tenant, that is to say, the occupant or tenant may not volunteer to pay merely because the taxes could be recovered from the owner, or previous occupant, unless they could also be recovered from him.

It will be observed that the section says he may deduct them "if the same could *also* have been recovered from the owner or previous occupant."

If force and meaning are to be given to the word "also," the section must mean that where the taxes can be recovered from the occupant, and also from the owner, &c., then the occupant may deduct them. The section says nothing about the occupant paying the taxes. It takes for granted that he has been compelled to pay them, and provides a mode of reimbursement.

Sec. 93, provides the mode of compelling payment by the occupant, viz., by distress; and this is the only mode. If therefore the municipality could have legally distrained for these taxes the plaintiff was justified in paying them, otherwise not.

I think it is clear from the reasoning of Wilson, C. J., in *Chamberlain v. Turner*, 31 C. P. 460, which I desire to adopt without repeating it, that there was no demand in this case as required by section 92, and upon which a distress under section 93 could have been founded, the only demand here, as also in that case, being the leaving of the notice on the premises and nothing more. Therefore I am of the opinion that the city had no right of distress, and that the plaintiff was never in danger from any legal claim upon him, and had no right to pay the taxes or to deduct them from the rent; and therefore as this was the only objection raised to the distress for the rent that the action fails.

It may be, I am inclined to think it is, the law, that where there is sufficient distress upon the property and the municipality by its own laches puts it out of its power to distrain, then section 100 does not avail to give the right to collect by action. I cannot think that the language there used: "If the taxes payable by any person cannot be recovered in any special manner provided by this Act," refers to such a case, but only to a case where there is no distress or sufficient distress, or where, for some other reason not arising from the neglect or default of the municipality, the taxes cannot be collected. If this is so, then it may be there was in this case no legal mode of recovery from the owner or previous occupant, unless indeed, the taxes became a lien on the land under section 105, and that the proceedings by sale, &c., are held to be a recovery. Such might be the argument if the recovery was to be from the owner, but hardly so if from the previous occupant. I merely point out these difficulties to emphasize what has been said in other cases about the necessity for regularity in making the assessment and proceedings for collection of the taxes.

In my opinion judgment must be entered for the defendant, dismissing the action, with costs.

CAMERON, C. J., and GALT, J., concurred.

Order nisi absolute.

[COMMON PLEAS DIVISION.]

GLASS v. CAMERON.

Judgment—Amendment affecting stranger—Setting aside at instance of stranger—Locus standi.

An order was made by the Master-in-Chambers amending a judgment entered against C. as executrix, so as to make it a judgment against her personally; and also amending the writs of *fi. fa.* in the sheriff's hands so as to be conformable with the judgment as amended. The order was made *nunc pro tunc* upon the allegation that all parties interested had consented, and that an execution at the suit of the M. Co. against C. personally had expired. On an application made by the M. Co. to set aside the order, on the ground that their writ had not expired, but was in full force; and that the effect of the amendment was to give plaintiff's writ priority, the Master made an order setting aside his previous order, and directing the amendments made thereunder to be struck out. On motion by way of appeal to the Divisional Court to rescind the last named order:

Held, CAMERON, C. J., dissenting, that the motion must be refused; for that though the M. Co., were strangers to the action in which the amendments were made, they had a *locus standi* to apply to have same set aside.

THIS was a motion by way of appeal from an order of the Master-in-Chambers rescinding an order made by himself on the 27th November, 1884, amending a judgment and writs of execution herein.

The judgment of the Master-in-Chambers was as follows:

MR. DALTON, Q.C.—This is an application to set aside an order made by me in Chambers, on the 27th November, 1884, in this cause. The order was in substance to change the judgment in this case entered in November, 1877, which was originally a judgment against Christina Colina Cameron, as the executrix of the late Malcolm Colin Cameron—afterwards revived against the Hon. Alexander Vidal as the executor of the said executrix, who has since the recovery of the original judgment died, the said Hon. Alexander Vidal being so the executor of the said late Malcolm Colin Cameron—into a judgment against the original defendant Christina Colin Cameron in her personal capacity; and to amend the writs of *feri facias* in the sheriff's hands to make them consistent with the roll of the judgment as so amended. The effect of the order was to make the judgment and writs of execution a lien upon the property of the said Christina Colina Cameron, instead of a judgment and lien against the estate of the late Malcolm Colin Cameron. That amendment was ordered *nunc pro tunc*, so that the judgment and executions, the latter issued on the 3rd of November, 1877, now stand as though originally against Christina Colina Cameron in her personal capacity.

The order was made, as then supposed, by the desire and consent of all parties interested. It turns out now that that was a mistake, as respects one execution creditor, The Metropolitan Loan and Savings Company, who had then a judgment with a *fi. fa.* in the sheriff's hands against Christina Colina Cameron in her personal capacity to the extent of some \$19,000—their *fi. fa.* placed in the sheriff's hands, 26th March, 1881.

As to this last mentioned execution, the principal affidavit now on the files, on which my order was made, states as follows: "That another execution against the lands and tenements of the said Christina Colina Cameron was placed in the said sheriff's hands in the month of April, 1881, which execution bears date the 26th day of March, 1881, but was not renewed on or before the 26th day of March, 1882, and therefore was allowed to expire."

Here is the place where the error has occurred. That writ was, I think, renewed on the 18th March, 1882; and, in my opinion, therefore, the said execution of the Metropolitan Loan and Savings Company instead of having expired as represented, was then and is now an existing binding writ.

The 25th day of March, 1882, was the latest day on which that writ could have been renewed, and on the 18th day of March, 1882, the Deputy Registrar at Ottawa, the proper officer for the purpose, did renew the writ on the *præcipe* of the solicitor for the said company, the stamps for which renewal are cancelled as of the 18th March, 1882. As will be seen there is no doubt whatever as to the day on which the renewal was made. There is really now no dispute about it. The Deputy Registrar marked in the margin of the writ a memorandum of the renewal, signed by him, as required by our rule of Court. The present contention has arisen from the way in which the Deputy Registrar has written the first figure in the number of the day of the month. 'Is it a figure 1, or a figure 2? In one case it would be the 18th, in the other the 28th, the first in due time, the last three days too late.

Pending this motion, I have examined the writ itself—nothing else can satisfy any one. No description can convey the truth to any one's apprehension. I have shown the endorsement to the learned counsel who argued this motion. Procuring that information, and getting the affidavit of the officer as to all that occurred with him, which I thought proper on this motion, has delayed my decision for a considerable time. I am of opinion myself, from the examination of the writ and memorandum, that the Deputy Registrar meant to write a figure 1, and that consequently the date is the 18th March, and not the 28th March. That it might be hastily read the 28th March I believe; but I think that a close examination of the memorandum itself would make most persons believe, as it has made me believe, that a figure 1 was intended and written, and that the date is the 18th.

If that be so, then the *feri facias* of the Metropolitan Building and Savings Company is an existing writ, and the effect of the proceedings described, as things now stand, is that, without any default on their part, that company's writ for \$19,000 has been cut out without any notice to

them by another writ being at this day placed in priority to the company's writ in the sheriff's office.

When the judgment in this cause was entered in November, 1877, it was entered regularly as upon default, and was the judgment that the plaintiff was by law entitled to under the circumstances. It was for \$10,964.42 debt and \$17.55 for costs, to be levied of the goods and chattels which were of the said Malcolm Cameron, deceased, at the time of his death in the hands of the executrix to be administered, if she had so much thereof, and if not then the costs (to wit, the \$17.55) to be levied of the proper goods of the defendant. That, as I have said, was the the judgment to which the plaintiff was then entitled by law. But I thought when the motion was made before me in November, 1884, and I still think, that when the plaintiff applied at that time to change that judgment into a judgment against the said Christina Colina Cameron personally, that it was unobjectionable upon the representations made that all parties interested, including the outside parties having executions in the sheriff's hands, were consenting and desirous to have that change made, for it was but the waiver by the representative of the defendant of a *scire fieri* enquiry, which in this case would have been a mere form. See *Archbold's Prac.*, 13th ed., p. 1008; *Williams on Executors*, 7th ed., p. 1974, and the notes. The fatal spot is the misrepresentation that the *f. fa.* of the Metropolitan Loan and Savings Company had expired.

It is that company that has now made this motion. It is objected that they are not competent to make it; but I think that they are. This is not for a mere irregularity, a thing that they have no concern with, where their interference would be an impertinence. Their execution has been cut out by an order obtained behind their back—they are injured to a large extent, and that all procured by a misrepresentation that their *f. fa.* had no existence. It seems to me a monstrous proposition that they are not to be heard in their own interest to reverse such a proceeding. Upon this point I refer to *Semple v. Nicholson*, 4 H. & N. 298, and to cases in our own Practice Reports, which have always been looked upon as maintaining sound doctrine: *Cochrane v. Scott*, 3 P. R. 32; *Nicholls v. Nicholls*, 3 P. R. 201; *McGee v. Baird*, 3 P. R. 9; *Armour v. Carruthers*, 2 P. R. 217, 5 U. C. R. 538.

It is proper to say in this place that, though I have spoken of the order as directing an amendment, it does much more. The truth is, that it allows an entire change in the rights and liabilities of the parties, and, particularly as to the applicants, that it does by relation place a *f. fa.* of the plaintiff in priority to the present applicants' *f. fa.*, which, in the ordinary course of practice, should have been some years subsequent to the applicant's *f. fa.*

I make an order now setting aside my order of the 27th of November, 1884, and ordering that the amendments made under it be struck out, and that the roll and writs be restored as they were previous to the making of that order.

I order that the plaintiffs shall pay the costs of this application.

The plaintiff having moved before Rose, J., by way of appeal, to rescind the order of the Master-in-Chambers, the motion, by consent, was enlarged before the full Court.

On May 27, 1885, the motion was argued.

Osler, Q.C., supported the motion, and referred to *Turner v. Lucas*, 1 O. R. 623; *Macdonald v. Crombie*, 2 O. R. 243, 10 A. R. 92; *King v. Duncan*, 29 Gr. 113; *McDonald v. Boice*, 12 Gr. 48; *Balfour v. Ellison*, 3 P. R. 30; *Perrin v. Bowes*, 5 U. C. L. J. 138; *Ferguson v. Baird*, 10 C. P. 493; O. J. A. Rule 353; *Williams* on Executors, 5th Am ed., 1693.

Richards, Q.C., contra, referred to *Lush's Prac.*, 3rd ed., 135; *Tidds Prac.*, 8th ed., 975; *Williams* on Executors, 8th ed., 1779, 1985-6, 1994-6; *Carr v. Cooper*, 1 B. & S. 230; *Semple v. Nicholson*, 4 H. & N. 298; *Saunders v. Hardinge*, 5 T. R. 9; *Newland v. Watkin*, 9 Bing. 113; *Pendry v. Watson*, 3 P. R. 23, 27; *Ashby v. Ashby*, 7 B. & C. 444; *Rigney v. Durie*, 9 U. C. L. J. 185; *Brembridge v. Wildman*, 1 Dowl. N. S. 774; *Nicholls v. Nicholls*, 3 P. R. 201; *Brooks v. Hodson*, 8 Scott N. R. 223; *Hunt v. Pasman*, 4 M. & S. 328; *Harrod v. Benton*, 8 B. & C. 217; *Balfour v. Ellison*, 3 P. R. 30.

June 24, 1885. CAMERON, C. J.—I am of opinion this appeal from the order of the Master in Chambers rescinding his own order allowing the amendment of the judgment roll in this action should be allowed, on the ground that the application to rescind was made at the instance of a stranger to the suit, the Metropolitan Loan and Savings Company, who are without a *locus standi* to interfere.

The weight of authority is against the right of a stranger, though his interests may be prejudiced, to apply to set aside or vacate a judgment or other proceeding unless there be fraud in the judgment or proceeding as against him, that is to say, unless such judgment or proceeding is bottomed in fraud, and is not a real or honest proceeding,

but got up and contrived for the purpose of obtaining some unfair or undue advantage over such stranger.

In the present case, the learned Master was of opinion, were it not for the fact that the applicants may possibly lose the priority of their execution against the personal lands of the defendant Christina Colina Cameron, in the hands of the executor under her will to be administered, the amendment was one proper to be made, and that the judgment was not bottomed on fraud as being a fictitious contrivance to defeat the applicants' judgment and execution without a debt or just claim to support the judgment existing. The vice is not in the amendment being *per se* improper, but in the fact that an erroneous statement was made to the learned Master in the affidavit on which the motion to amend was based as to the condition of the claims against the lands of the defendant in the sheriff's office. The misstatement related to the execution of the said Metropolitan Loan and Savings Society, and was as follows: "Another execution against the lands and tenements of the said Christina Colina Cameron was placed in the said sheriff's hands in the month of April, 1881, which execution bears date the 26th day of March, 1881, but was not renewed on or before the 26th day of March, 1882, and therefore was allowed to expire." The fact being, that the said writ was properly renewed on the 18th day of March, 1882. I think no one looking at the writ and memoranda of renewals endorsed thereon with the marking of the fee stamps, without great want of care could arrive at the conclusion that that writ was not renewed before the 26th day of March. It is explained on behalf of the plaintiff that this statement was not made to deceive, but on account of the manner in which the figure 1 before the 8 in the date of the renewal was written it made the date appear to be the 28th. The 18th was in time, the 28th too late; and if this misstatement made wilfully would properly have prevented the amendment, I should be inclined to adopt the view that there was so much carelessness in the examination of the writ that the

same result should follow as if the erroneous statement had been made wilfully and with bad intent.

If as between the parties the amendment ought to have been made, then it does not appear to me that the plaintiff was bound to make any other execution creditor a party to the application to amend or to give notice of such application. Why should that which was just between the parties not have been done, and why should a stranger to these proceedings interfere to say that that which was just should not be done?

If by a mistake committed originally in the entry of the plaintiff's judgment, another creditor of the defendant should lose some legal advantage which the error had given him, he might reasonably complain, and there might be a way of preserving to him such legal advantage; but surely it is not to be done so as to deny to the plaintiff the measure of justice which belongs to him.

I make this observation on the assumption that the defendant, Miss Cameron, was in fact personally and not merely in her representative character of executrix under the will of her father liable to the plaintiff for the amount for which judgment was recovered. She ought to be the best judge acting under the advice of her counsel whether she was so liable. She knew whether she had so dealt with the estate as to make her personally liable; and it does not appear to me, on an application to amend, the Court should be astute to determine against her own desire and consent. The true proceeding would have been, not to amend the judgment so as to award execution against her personally, but for the plaintiff to proceed by *devastavit*. If she is improperly consenting to such a liability, it will be a fraud upon her other execution creditors, and they have the means of attacking the judgment by a proceeding to set it aside on the ground of fraud in a manner much more satisfactory than by a proceeding where the evidence is taken upon affidavit, and success to the subsequent creditors means injustice to the plaintiff in depriving her of a judgment she is entitled to, simply because it may do a possible wrong to such creditors.

I do not wish to be understood as expressing any opinion upon the merits, but to confine myself entirely to the consideration of the *status* of the Metropolitan Loan and Savings Company to make the application and attack the original order to amend of the learned Master-in-Chambers by an application to rescind, instead of by action to set aside the judgment for fraud.

The language of the late Chief Justice Draper, in *Nicholls v. Nicholls*, 3 P. R. 201, is as applicable to this case as it was to the circumstances of that case, though in that there was no actual assertion of an untruth, but merely a withholding from the Court of information.

He said, at p. 206: "If fraud or collusion between the plaintiff and defendant were alleged, as where the plaintiff was thereby enabled to obtain judgment for an unfounded demand, or other creditors are misled or delayed, the plaintiff taking some advantage thereby, or other creditors are influenced or induced to take or withhold particular proceedings, or to change their position unfavourably to the recovery of their just debts, there might be found a mode to prevent the success of such frauds, though perhaps not in this form."

In the case to which this summation of the ways in which fraud might operate to give a creditor prejudiced a right to relief, the Court held that a stranger, though a creditor of the testator, fraud or collusion between the plaintiff and defendant being denied, had no right to prevent or interfere with an amendment in character like the present, and the fact of the other judgment being unknown to the Judge when he made the order was immaterial. Though reported in the practice reports, this was the decision of the full Court of Queen's Bench, and the language of Chief Justice Draper was therefore the language of the whole Court; and he made these further observations as to the duty of the plaintiff in informing the Court of the existence of other executions. "But the only ground suggested * * beyond the necessity for the amendment for the plaintiff's interest, and procuring

the order to make it, is an alleged fraudulent concealment of the existence of the Chancery suit and the County Court suits. We do not find it asserted in the affidavits on which the rule *nisi* was granted that the plaintiff was aware of these different suits; but if he was, how did it become his duty to make their existence known, and if not his duty where is the fraud in withholding the information? * * On any ground of fraud or collusion we think the case wholly fails; and that the applicants are prejudiced because the plaintiff's judgment and execution as amended is entitled to priority over theirs—the judgment being as is shewn for a *bond fide* debt—is no reason for our interference.”

I understand from the language I have extracted of that very able and distinguished jurist, that to give a creditor, not a party to a suit or proceeding, a right to question the judgment recovered therein, there must be actual fraud in the judgment itself, or something must have taken place between the judgment creditor and the other creditors, or some of them, that would estop such judgment creditor from setting up his own judgment as valid against them, where there is actual fraud, that is, no *bond fide* or real claim to support the judgment. It needs the citation of no authority, when the reports are full of authority, to show that it cannot be upheld against other judgment creditors. An example of the case put where other creditors are misled or delayed will be found in *Martin v. Martin*, 3 B. & Ad. 934. In such cases the principle of estoppel may very properly be invoked.

It would be going very much further to allow, on any other ground, a subsequent judgment creditor to say an amendment must not be made by which he may possibly lose an advantage he had acquired. To do so, in the absence of fraud, would be contrary to the spirit of the decisions in *Turner v. Lucas*, 1 O. R. 623, and *Macdonald v. Crombie*, 2 O. R. 243, 10 A. R. 92, even should the amendment complained of have the effect of displacing the

priority obtained by the Metropolitan Loan and Savings Company's execution.

It does not, however, seem to me that the amendment can have that effect. Strangers to the judgment and execution will not be bound by what they are in seeming, but by what they are in fact; and as executions take effect from the time they are delivered to the sheriff and not from their teste or date, the company cannot be precluded from shewing that at the time they placed the writ of execution in the sheriff's hands, the plaintiff then had no writ against the lands of the defendant. The writ that the sheriff then had had not attached upon the defendant's lands, and no more constituted a lien upon such land than a blank piece of paper would have done, except for the small amount of costs for which judgment of execution against her in her personal or individual capacity had been awarded. The amendment virtually created a new judgment, the execution on which came to the sheriff's hands after the company's had been laid on and bound the defendant's lands. Suppose Miss Cameron, the defendant, at the time the company's execution was received by the sheriff, had conveyed her lands to the company in payment of their claims, could it be said after the amendment that the conveyance so made would not hold the land against the plaintiff's writ? I do not think the law is so unreasonable as to say otherwise; and I see no valid distinction to be drawn between a conveyance and the company's execution, because if the defendant had the power of disposing of the land the company's execution must have attached upon it.

The authorities referred to by the learned Master in Chambers as his warrant for rescinding his own order on the facts presented in this case do not support the conclusion to which he came.

Semple v. Nicholson, 4 H. & N. 298, was a very different case. The judgments impeached were attacked on the ground that the warrants of attorney under which they were signed were filed without being stamped, and such

warrants by the Act 13-14 Vic. ch. 97, sec. 12, it is provided shall not be admitted to be "good, useful, or available in law or equity" until the same shall be duly stamped. The attorney on filing them was told that he ought not to file them without stamping them, but he persisted in filing them, and said that he would do so at his own personal risk. The plaintiff applied to be allowed to take the warrants off the file to have them stamped in the manner indicated by the Act. A judgment creditor of the defendant who obtained a judgment upon a properly stamped warrant of attorney, such judgment being subsequent to the impeached judgments, showed cause in the first instance, and also moved to set aside the plaintiff's judgments. The application to take the warrants off the file to be stamped was refused, to support the judgments then signed, but the plaintiff was permitted to take them off the files to stamp and sign fresh judgments thereon.

The decision turned upon the effect of the statute relating to warrants of attorney, and there having been a breach of the revenue law, in which every one of the public was interested, a person who would be damnified more than others of the public might well be permitted to say, that which a statute declared not to be good, useful, or available in law or equity, should not be made good, useful and available, to his prejudice. The matter being brought before the Court by the plaintiff's own application, the Court was seized of it and competent to make any order that was just in respect to it. There is, I presume, no doubt that when a party asks a Court to use its discretion in giving him an indulgence, which he can only obtain through the exercise by the Court of its discretion, he must submit to such terms as the Court may justly impose, and though the Court in that case might have allowed the removal of the warrants to be stamped so as to give vitality to the judgments entered thereon, it did not do so, but set aside the judgments, and then permitted the removal of the warrants so that fresh judgments might be signed.

That course might have been pursued in this case; but, in the presence of a valid judgment, I do not see my way to now impose a condition that the Master did not see fit to impose when the parties who had a right to come before him were before him.

The case of *Martin v. Martin*, 3 B. & Ad. 934, is not an authority for its being done now, or for setting aside the judgment. There Taunton, J., doubted whether the Court could interfere at the instance of third parties, but thought they might by virtue of their general jurisdiction over warrants of attorney, and because the transaction was fraudulent.

The case of *Cochrane v. Scott*, 3 P. R. 32, must have been referred to by the learned Master in his judgment inadvertently, as a reference to the case shews it has no bearing on the question.

In *Armour v. Carruthers*, 2 P. R. 217, the decision was against the application; and the Chief Justice Sir John Robinson and Mr. Justice McLean express no opinion on the question of the right of a third party to interfere. But Mr. Justice Burns did lay it down broadly, that the objection to the *status* of a judgment creditor to make a motion to set aside the judgment of another creditor had no weight. The authorities he referred to in support of this opinion were *Martin v. Martin*, to which reference has already been made, *Harrod v. Benton*, 8 B. & C. 217, which was also the case of a warrant of attorney; and although the Court assumed that it had the power on motion supported by affidavits, where fraud was clearly established, to set a warrant of attorney, judgment and execution aside, it declined to do so till the fraud had been found by a jury.

Brembridge v. Wildman, 1 Dowl. N. S. 774, was also the case of a warrant of attorney in which the Court declined to interfere.

Bell v. Tidd, 6 Jur. 59, in the Bail Court, does not appear to bear upon the question; and in *Cook v. Edwards*, 2 Dowl. N. S. 55, it was only decided that the defendant's

assignees had a right to interfere and avail themselves of the objections to the validity of the warrant of attorney that the defendant himself could have urged against it under the Act 1 & 2 Vic. ch. 110.

On the facts as they are now before the Court, I do not think the Metropolitan Loan and Savings Company were properly before the Master in Chambers, but were intruders upon the plaintiff's premises *sc* to speak, and should have been turned out as having no right there.

The appeal therefore should be allowed, and the rescinding order be rescinded, and the amending order allowed to stand; but owing to the affidavit on which the original amendment was made containing the erroneous statement that the company's writ had not been renewed, the allowance of the appeal should be without costs.

ROSE, J.—I have read with care the judgment of the learned Master, and entirely agree with the reasoning and the conclusion.

Indeed on the argument there was, I think, no doubt expressed by any member of the Court as to the propriety of the order if the practice allowed the application in the form it was made, *viz.*, by a third party not a party to the action in which the amendment was made. I have been able to satisfy myself that the learned Master was quite right in entertaining the application by the company, and making the order he did on such application.

If necessary to support the order I should not hesitate to find that the clause in the affidavit before the learned Master, extracted in the judgment, did not state all the facts known to the deponent; was a wilful withholding of material facts and a fraud upon the Court and the company whose execution it was thus sought to cut out.

As against the plaintiff I shall not closely enquire what was the legal effect of the amendment. It was intended to obtain priority over the company, and, if any doubt has been created, it should not be allowed to remain.

I find in the affidavit of Margaret McLean, filed in support of the original order, she being interested in maintaining the priority thus obtained, that a copy of the execution in the suit of *The Metropolitan Loan and Savings Co. v. Cameron* was obtained in the month of May, 1884, prior to the application to amend, by the solicitor for the plaintiff.

The affidavit further states that then for the first time the plaintiff became aware that the said company had an execution personally against Christina Colina Cameron.

Then follows this clause: "7. That in the month of June last the plaintiff through her solicitors was made aware of the fact *that, as appeared by the said execution*, the same was not properly renewed, and in fact, *as her solicitor reported*, had expired and was no longer in force."

The affidavit referred to by the learned Master was made by the plaintiff's solicitor on the 26th of November, 1884.

Looking at the original writ, a copy of which was before the solicitor, it appears to be dated on the 26th of March, 1881. Underneath is the memorandum in question: "Renewed for one year from this 28th day of March, A. D. 1882." WM. MATHESON, Dep. Reg. at Ottawa.

I have written the renewal as on the 28th, assuming that the copy so read.

So far it would strike any solicitor as a matter of enquiry how a writ which expired on the 26th of March could be or was marked by an officer of the Court as renewed on the 28th, two days after the year had expired. Certainly the learned Master should have been put in possession of the fact of the clerk having marked the writ as renewed.

There moreover appeared immediately underneath the above memorandum the following: "Renewed for one year from this 13th day of March, A. D. 1883. WM. MATHESON, Deputy Registrar at Ottawa.

This apparent fact was withheld from the learned Master.

In the margin a similar memorandum "Renewed for one year from this 7th day of March, A. D. 1884;" and of this no mention is made in the affidavit.

These endorsements were quite sufficient to arouse enquiry in the mind of any one not wilfully shutting out light.

If the solicitor had taken the trouble to examine the original writ he would have found that the figure which has been read as "2" was of the same character as the "1" in "1882," and that the "2" in 1882 was of an entirely different form.

He would also have discovered on the face of the writ, three law stamps, on each of which was written across the face as follows: "Mar. 18, 82;" and the sheriff could have told him that he received the writ marked renewed on the 19th day of March, 1882.

The careful wording of the clause extracted from the solicitor's affidavit does not indicate a careless mind, and only a mind so careless as to render its possessor unsafe as a counsellor, could have passed by all these indices pointing to facts which should have been most carefully looked into.

If there was merely neglect arising from carelessness, I fear it must place the party guilty of it in the position with regard to others as if it had been wilful. If there was wilful neglect, there was fraud.

There is no doubt in fact the writ was duly renewed on the 18th March, 1882; and therefore when the solicitor stated in his affidavit that it was not so renewed, he was making a misstatement of fact, which, if not wilful, was the result of such negligence and such careless disregard of the right of the said company as to make the order thus obtained a gross fraud upon their rights, so gross, that the moment the Court became informed of the facts, from whatever source, it became its imperative duty in the exercise of what Lord Campbell, C. J., in *Cameron v. Reynolds*, 5 E. & B. 305, calls "a general equitable jurisdiction over our own judgments," to at once interfere and set right a great wrong. See *Purdie v. Watson*, 3 P. R. 23, 26.

It seems to me the notice of motion to rescind the order might have been in a form similar to that directed by Wood, V. C., in *Bourbaud v. Bourbaud*, 12 W. R. 1024, 1025, viz., "the Court having been informed, on the part of the Metropolitan Loan and Savings Company that the plaintiff has obtained an order, &c., unless on the day of _____, the plaintiff shewed good cause, &c., the said order, and all amendments thereunder, will be rescinded and set aside."

There has been no difficulty in reaching what is practically a fraud at the instance of a third party even at law; and a Court of equity never appeared to feel any difficulty in interfering, even when at law relief would have been refused.

In addition to the above cited case, see *McDonald v. Boice*, 12 Gr. 48. The head note is: "A judgment recovered at law, by the fraudulent acquiescence of the defendant in the action, will be enquired into in this Court at the instance of a subsequent judgment creditor; although the rule at law is that only the party to the action can move against the judgment there."

Spragge, V.C., at p. 50, says: "At law Wm. Beatty might have applied to reduce it, but a Court of law would not hear such an application from a subsequent incumbrancer: so that unless that (query "this") Court can interpose, it depends upon the will of the judgment debtor whether those who have subsequently recovered judgment against him, shall have his effects swept away for a fictitious debt."

Fortunately under the present procedure we feel no difficulty as to the exercise of all the powers of a Court of equity.

It was urged that the Court should not interfere on summary application, but leave the parties to interplead when the proceeds of the sale of the lands come into the hands of the sheriff. To this the language of Draper, C. J., in *Purdie v. Watson*, 3 P. R. 23, at p. 27, is applicable: "If the present writ were continued in force in the amended form

asked for, inasmuch as the sheriff received it on the 9th of October, 1859, questions might be raised as to its possible effect in binding the defendant's lands, which it seems to me it would be more just to prevent or avoid."

In addition to the cases cited by the learned Master the following may be referred to: *Macdonald v. Crombie*, 2 O. R. 243, 10 A. R. 92, and cases cited in judgment and arguments of counsel: *Balfour v. Ellison*, 3 P. R. 30-32; *Wilson v. Wilson*, 2 P. R. 374; *Martin v. Martin*, 3 B. & Ad. 934; *Harrod v. Benton*, 8 B. & C. 217-219.

It seems clear from the cases referred to that, if the facts had appeared, such amendment would not have been made in the absence of the company, and without protecting them. Perhaps an order amending the original order declaring it should not affect intervening judgment creditors would have answered the purpose. However, in *Semple v. Nicholson*, 4 H. & N. 298, the Court refused to allow certain warrants of attorney to be taken off the files for the purpose of being stamped, other creditors having in the meantime obtained judgments.

Pollock, C. B., said, at p. 304: "The judgment entered upon the unstamped warrants of attorney must be considered as having passed *per incuriam*. * * The judgment must be set aside; *after which* the parties may take the warrants of attorney off the file, and get them stamped, and then sign fresh judgment."

The learned Master's order is in accordance with the above judgment.

I have had some doubt as to the power of the learned Master to set aside his own order after it was acted upon. See *Shaw v. Nickerson*, 7 U. C. R. 541. As, however, there is power in the Court to act I think it unnecessary to further consider the question, as it would, in my view, only result in a similar order being made.

The order may thus stand, and the appeal be dismissed, with costs.

In looking at the original writ, which was amended, I find the following endorsement: "This writ is withdrawn

by plaintiff's solicitor. The answer of J. Flintoff, Sheriff, Sheriff's office, Sarnia, Ont., 3rd June, 1884."

It does not appear for what purpose it was withdrawn. It was not amended until December following. This may be a further difficulty in the plaintiff's way.

GALT, J., concurred with ROSE, J.

Motion dismissed, with costs.

[COMMON PLEAS DIVISION.]

MCNEELY ET AL. V. MCWILLIAMS ET AL.

Contract in writing—Additional parol term—Parol evidence—Admissibility of.

The defendants wrote to the plaintiffs: "We will furnish scows, and deliver all the stone required for the Omemee bridge as fast as you require them, for the sum of seventy-five cents per cubic yard." To which the defendants replied. "We accept the above offer at the price and conditions named."

Held, CAMERON, C.J., dissenting, that parol evidence was admissible to show that the carriage was to be by lake and river navigation, and was only to take place provided the water along the route remained of a named height, sufficient to enable the defendants to use their steamers in towing the scows.

THE plaintiffs sued for breach of contract to furnish scows and deliver stone to the plaintiffs at the Omemee bridge, which the plaintiffs were building under contract for the county of Peterborough.

The plaintiffs' statement of claim set out that on the 26th August, 1884, the plaintiffs were quarrying stone at Bobcaygeon, to build the stone work of a bridge at Omemee, and on that day the defendants contracted and agreed with the plaintiffs to deliver all the said stone required for the said bridge as fast as the plaintiffs required the same

for the sum of 75 cents per cubic yard. In the month of September the defendants entered upon the said contract, and after delivering a certain portion of the said stone at Omemee refused to complete the same although requested so to do by the plaintiffs, whereby the plaintiffs were put to great loss, costs, charges, and expenses ; and they claimed \$356 damages.

The defendants, in their statement of defence, alleged that the contract into which they entered was not truly set out ; but that the true agreement was, that in the event of the water in a certain stream, called Pigeon Creek, through which the defendants had to pass in delivering the said stone, remaining of at least the depth marked by the defendants and made known to the plaintiffs before the making of said agreement, the defendants would deliver the said stone required for said bridge as fast as the plaintiffs required the same, for the sum of seventy-five cents per cubic yard ; and that should the water fall below the depth above specified, then the agreement was to be off. And immediately after making the said agreement, and before the plaintiffs required the defendants to deliver the said stone or any portion thereof, the water in the said stream fell to a considerable depth, about one foot below the depth agreed on, and the defendants were thereby prevented from carrying out said contract, and were released from the same. The defendants were always ready and willing to perform the said contract, provided the water in the said stream continued of the depth stipulated, which depth was necessary and requisite to enable the defendants to manage and float their boat and scows.

The defendants, in their said statement of defence, by amendment set out the memorandum of the contract as below ; and averred it did not contain all the terms of the bargain between the parties ; and that it was a condition that it was only to be binding if the water remained of sufficient depth as before stated. They also alleged that the signature of the defendant parties to the said memorandum was obtained by the representation of the plaintiff

Henry Walters, and on the understanding with him, that it was not necessary to embody all the terms of the agreement in the said memorandum.

The cause was tried before Rose, J., and a jury, at Lindsay, at the Spring Assizes of 1885.

The following was the contract referred to :

“ Lindsay, 26th August, 1884.

“ Messrs. McNeely & Walters.

“ GENTLEMEN—

“ We will furnish scows and deliver all the stone required for the Omemee bridge as fast as you require them for the sum of seventy five cents per cubic yard.

“ A. W. PARKIN.”

“ We accept the above offer at the price and conditions named.

“ MCNEELY & WALTERS.”

The evidence showed that the plaintiffs' stone was at Bobcaygeon, from which place it was to have been carried by scows by Pigeon River and Pigeon Lake to Omemee, where the plaintiffs were building the stone work of a bridge under contract to do so. The cost of carrying the stone at the contract price would have been about \$150: that the defendants did not perform the contract having taken up only one haul or tow; and that they refused to carry any more till the water was deep enough to enable them to tow the scows from Bobcaygeon to Omemee by their steamer the Ontario: that in consequence of such refusal the plaintiffs were obliged to pay other parties for taking the stone for them, which was taken by a steam tug and scows for \$499.85, making a loss to them of \$349.85, which they claimed to recover from the defendants.

The evidence given to vary the written contract, the admissibility of which was objected to, was as follows :

A. W. Parkin, one of the defendants, said, that two or three weeks before the writing was signed he met the plaintiff Walters on the street, who said they had not finally completed the arrangements, but the chances were they would want to get the stone towed. “He said he thought we would stand a good chance to get the contract if we could

do it. I told him it all depended on the captain of the boat, Mr. Jacobs, whatever he said. Saw him again; told him we thought we could take it up for a dollar a yard. I told Walters they had been up with some lumber for R. C. Smith & Co., and Jacobs said if the water stayed as high as it was we could take it up. Walters afterwards came to my house. He told me he had seen Jacobs and McWilliams, and they told him to come to me and finish it up. * * We disputed about the price for some time.

* * He said he would give seventy-five cents. * *

I said there was a good deal of delay in loading. He said they would load as fast as possible. I said we had five hands on board, and he said he would give them all work while they were standing there, helping to load, and pay their wages while loading, and also at Omemee in unloading. * * He said he would put a man on to take charge of the loading and pay him his wages, but he had to work all the time except the time he was pumping the scows, and that he was not to be charged with. He was to pay a dollar and a quarter a day. I was to find the man and he was to take the responsibility of the loading, and then I said I would take the seventy-five cents. Had no conversation just at that minute about the water line. He said then, 'Just write out McNeely & Walters a formal letter acknowledging you will do the towing for this seventy-five cents a yard.' So I went away up into my room and brought a pen and ink * * and said, you block out a document of that kind as you are more accustomed to an agreement than I am, and we will see how it looks. So he wrote that document out and he read it. When he read it I said, how about Jacob's water mark? Well, he says, with a kind of a laugh, what about it? Why, says I, how is the water? And he said, it is an inch and a half higher than this mark now. I said, had that not better be entered in this document? He said, there is not the slightest occasion for it. I said, why? or made some remark like that. He said, if there is not sufficient water to float your boats to do the work,

there is an end of it. We do not want you to do impossibilities. So under that arrangement I signed the paper. The mark alluded to was Jacob's water mark. * * On the railroad bridge Mr. Walters told me where it was. He said the water was an inch-and-a-half higher. Then we talked about in case the water should go down, and I said, in any case the stone could be brought round by Lindsay. He said he did not want to bring it by Lindsay, that it would cost a great deal more to bring it by Lindsay. I understood it was going to take three trips. * * A few days after I signed the document I got a card to place the scows at the quarry as soon as possible, that the stop logs had been taken out at Buckhorn, and the water was falling. I gave this card to the captain, and told him we would have to lose no time."

James A. McWilliams, one of the defendants, swore he had a conversation with the plaintiff Walters on the street in which he, defendant, proposed to tow the stone, provided the water would stay up to a certain mark, the captain (Jacobs) had left on the pier at the railway bridge. The water mark was definitely mentioned. That was the condition, that if the water stood up to this water mark the defendants would do it, but if the water fell below that to any extent they could not do it. This conversation was about two or three weeks before the contract was signed.

Silas Jacob, one of the defendants, in his evidence said: "I was up Pigeon Creek on 22nd July, 1884. The boat (The Ontario) draws two feet eight inches of water. First spoke to Walters about hauling this stone at Bobcaygeon in August before the paper was signed by Parkin. I think I told him I would like to do the work, and in case we did this work successfully there was a chance of doing more. I believe there was something said about the height of the water at the time I went up with the lumber, and I asked Mr. Walters to let us know if the water was about the same height or how it stood; and I then gave him a mark at Onemee on the railroad bridge, the bottom of the sill on the railroad bridge. I told him if the water

kept at that level we were safe in taking the job: that we could do the work successfully. I believe we three men (defendants) met on the subject of this contract once. I cannot say when it was; it was on a Saturday night we talked it over. I do not know that we came to a definite conclusion, but we did come to a kind of conclusion. Walters seemed to understand the mark perfectly. I fixed on the mark at the time I went up with the lumber. I was able to get through comfortably with the lumber. As near as I can tell the scows drew two feet and a half of water. I had no other conversation with Walters till Monday morning the 1st September. He came down to the boat in the morning * * and said he was ready for us to place the scows and was anxious for us to place the scows.

Joseph Parkin, son of defendant, A. W. Parkin, swore that on the 26th August he happened to be going through the room, and his father asked him to sit down. He said Walters and he were talking over the towing matter. When I sat down my father went and got the pen and ink to write with, and there was some talk. Walters did the writing and read the writing, and after he read it over my father said, 'what about the water mark? hadn't that better be put in the writing.' Walters said he did not think it necessary. He said 'if the water is not high enough, that puts an end to it. I do not expect a man to do impossibilities.' I spoke up and said, if the water is not up to this mark on the pier, that is Jacob's mark, he cannot go up: and Walters said it was an inch and a half above the water mark then. My father said the water is up to that mark now, but if it fell before the work was done, what would be the consequence? Walters said there was no danger of the water falling. Then there was some talk about if the Ontario could not do the work, what boat could? My father said there was Burke's boat that he did not think would draw as much as the Ontario, that was not finished yet. Then there was talk about the Water-Witch, that belongs to us. Walters asked if she

could not do the work? I told him no, that she drew more water than the Ontario. Up to this time the writing was not signed. Walters read it, then my father took it, and I guess read it too. I copied the writing in a day book belonging to my father. Mr. Walters and I walked down street together * * He stopped and said, 'I forgot to ask your father whether I had better not have Jacob's name on this too,' and I said I did not think it was necessary, if the water was high enough, the work would be done all right; and he again repeated, the water was over the water mark."

Henry Walters, in his evidence, positively denied there was any conditions whatever about the water, except that he told Jacobs it was an inch and a half above his water mark, which was true.

It was proved by other independent testimony that the water was, at the time the contract was signed, an inch and a half above Jacobs' mark.

The learned Judge submitted certain questions in writing to the jury, which were, with the jury's answers, as follows :

"1. Did the paper signed by Parkin and McNeely & Walters, contain the whole agreement between the parties?" A. "No."

"2. Was it agreed between the parties that the defendants were not to be bound to deliver the stone if the water fell below Jacob's mark?" A. "No."

"3. Was it possible for the defendants to have towed the scows to Omemee during September or October by the steamer Ontario?" A. "No."

"4. Could the defendants have towed the scows to within a reasonable distance of Omemee, and have poled them the rest of the way?" A. "Yes."

"5. What damages do you think it just for the defendant to pay?" A. "No damage, the defendants lose what they have done."

After the jury had returned to Court with their answers the learned Judge asked :

Q. "What did you think was the contract other than was in the paper?" A. "The conclusion we came to was, the probabilities are Mr. Walters and Mr. Parkin had understood each other they would not force him to take it up if the water came so they would have to pole, or, anything of that kind, expect him to pole. Also as to the place it was to come from,

and with regard to the employment of Mr. Parkins's men when they were loading and unloading, we came to the conclusion [that was talked of at the time the agreement was drawn up.]

Q. "Did you think it was agreed between them that if the water fell so that they could not go up, the contract was not to be enforced?" A. "If the steamboat could not go up that it was not to be enforced."

Q. "But did you understand it was the agreement they were to deliver the stone if the water fell below the mark?" A. "They all disagreed as to how much it should have fallen to make a legal right of stopping."

Q. "You could not come to a conclusion if it fell say half an inch?" A. "No."

Q. "But if it fell substantially so as to prevent a steamboat taking up the contract was to end?" A. "Yes."

Q. "Your understanding was the contract was not to be enforced if they could not tow up the scows with the steamboat." A. "Yes."

Mr. Osler, for defendants, moved for judgment on the findings.

The Court—"It may prevent further difficulty if I put another question": Q. "Did you think the amount the plaintiff paid was a reasonable amount, if as matter of law the defendants ought to pay anything?" A. "The majority of us thought the damages were far too large."

The counsel for the plaintiffs at the trial objected to any evidence being received to alter or vary the terms of the contract.

On the above answers of the jury the learned Judge directed judgment to be entered for the defendants.

In Easter Sittings, May 20, 1885, *G. T. Blackstock*, obtained an order *nisi* calling on the defendants to shew cause why the verdict for the defendants, and such of the findings of the jury as were adverse to the plaintiffs, should not be set aside and a verdict entered for the plaintiffs for \$350; or that a new trial be had between the parties, on the grounds:

1. That the said findings were contrary to law and evidence, the weight of evidence, and the learned Judge's charge.

2. That the learned Judge erred in admitting parol evidence of the alleged contemporaneous variation of or addition to the written agreement of the 26th of August, 1884.

3. That, even if properly admitted, the said evidence did not support the second or amended paragraphs of the defendants' statement of defence.

4. That the evidence of the defendant McWilliams as to conversations with the plaintiff Walters as to the height of water in Pigeon river ought not to have been admitted.

5. That there was no evidence to support the defendants' statement of defence; and in any event the case ought to have been withdrawn from the jury and tried by the Judge.

6. That the learned Judge should have told the jury that they could only find in favour of the defendants upon the clearest evidence; and that if there was any doubt in their minds they should find in favour of the plaintiffs.

The plaintiffs also gave notice of motion to be heard on the return of the order *nisi*, that the judgment entered for the defendants should be set aside and judgment entered for the plaintiffs for \$356, on the findings of the jury in their favour.

During the same sittings, June 1, 1885, *G. T. Blackstock* supported the motion. The question is, whether it was competent to the defendants to introduce parol evidence. When a written agreement has been entered into, parol evidence is not admissible to alter or vary it: *Taylor* on Evidence, 8th ed., 966; *Pym v. Campbell*, 25 L. J. Q. B. N. S. 277; *Davis v. Jones*, 17 C. B. 625; *Wallace v. Littell*, 11 C. B. N. S. 369; and the question is one for the Court, and not for the jury: *Bartlett v. Smith*, 11 M. & W. 483. See also judgment of Harrison, C. J., in *Mason v. Scott*, 22 Gr. 592, 619, where the authorities are discussed. The agreement itself must decide whether it contains the whole contract: *Naumberg v. Young*, 43 Amer. R. 380; *Harris v. Great Western R. W. Co.*, 1 Q. B. D. 515. The only cases in which parol evidence is admitted are where there is fraud or mistake, or where the instrument is delivered as an escrow; or in the case of a collateral agreement, that is, where either contemporaneously or as a preliminary measure the parties had entered into a distinct oral agreement in some collateral matter; and also where the contract depends on a series of letters and parol evidence is admitted to connect the documents: *Stephen's*

Dig. of Evidence, 104-6: *Ellis v. Abell*, 10 A. R. 226; *Bennett v. Tregent*, 24 C. P. 565; *McMullen v. Williams*, 5 A. R. 518. Even if parol evidence is admissible, evidence of conversations between the plaintiff Walters and the defendant Williams and Parkin, prior to the time when the contract was signed, is not admissible. What took place on the 26th of August, when the contract was entered into, must be alone looked at. The evidence, however, does not support the defendant's contention, for it clearly appears from the evidence of the government inspector that the water was of the height contended for to enable the scows to be taken up.

Oslor, Q. C., and O'Leary, contra. The writing does not contain the whole contract between the parties, and therefore parol evidence is admissible to shew what the real contract was. The writing only contains one term, namely, the price. Neither the place of starting or destination is given, nor is the course of transit given; and all these therefore must be supplied. By the contract the defendants are to furnish the scows when required by the plaintiffs. This means when the plaintiffs might reasonably require them, and they could only reasonably require them when the water was high. The price that the plaintiffs were to pay, shews that it was only contemplated that the work should be done when the water was of a certain height, for when the water was low a very much smaller quantity only could be carried, and the cost of carriage would be necessarily increased; and it appears that while the contract price was 75 cents per cubic yard, it cost the plaintiffs when the water was low \$3.00 a cubic yard. It was also part of the agreement between the parties, that the plaintiffs were to employ and to pay the men while loading and unloading the scows. It is quite clear, therefore, that, in the contemplation of the parties, the writing was not intended to include all the terms of the contract. The case of *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601, 5 S. C. R. 204, is very much in point. There the contract was to carry coal oil, nothing being said about the kind of cars; and it was

held that evidence was admissible to shew that in the contemplation of the parties the oil was to be carried in covered cars. See also *Chamberlain v. Smith*, 21 U. C. R. 103; *Harris v. Rickett*, 4 H. & N. 1; *McGinness v. Kennedy*, 29 U. C. R. 93. The evidence here shews that a complete contract was entered into by parol in all respects, except as to price, and this was settled and put into writing.

June 27, 1855. CAMERON, C. J.—There can be no question, if the writing contains the whole contract, that there was a breach of it on the defendants' part, for which the plaintiffs are entitled to recover substantial damages.

The plaintiffs contend that evidence to vary the contract by adding to it a condition that it was not to be performed unless the water permitted the defendants to use the steamer Ontario in towing the scows, which is substantially what the defendants claim, was not admissible, and, having been admitted, there must be either a new trial or judgment for the plaintiffs for \$350, the difference between the agreement price per cubic yard for hauling the stone and the amount they paid other parties for doing the work, in consequence of the defendants failure to do it.

The defendants, on the other hand, contend, the contract as a whole was not reduced to writing, and the written memorandum was not intended to contain the whole contract. From the contract itself, the *termini* of the haul or carriage of the stone cannot be ascertained; and it was part of the arrangement or agreement between the parties, that the plaintiffs were to employ and pay the men while loading and unloading the scows. The writing was only to show the price to be paid per cubic yard for hauling the stone.

These contentions present several questions by no means free from difficulty of solution. The first is, does the writing on its face show a contract complete in its terms taken in connection with the surrounding circumstances which the Court may look at in interpreting it? If it

does, it appears to me the weight of authority is against adding a condition as to the depth of water, or the employment by the plaintiffs of the defendants' men, and paying them during the loading of the stone. The evidence shews that the stone was at Bobcaygeon; that it was that stone that was to be hauled or carried by the defendants, and the contract itself shews it was for the Omemee bridge. So putting ourselves in the place of the parties, and reading the contract, it would appear to be complete, with all that was necessary stated to shew what each party had to do, that is, the defendants to receive and carry to Omemee the stone, readiness to deliver it by the plaintiffs to them at their scows at Bobcaygeon, being a condition precedent to their obligation to receive, and the plaintiffs upon such delivery at Omemee to pay the agreed freight of seventy-five cents per cubic yard. In this respect the present contract would come within the authority of such cases as *Mumford v. Gething*, 7 C. B. N. S. 305; *Macdonald v. Longbottom*, 1 E. & E. 977, in which oral evidence was admitted to show the subject matter of the contract, to denote the thing in respect of which the parties were contracting.

In the latter, the terms "*your wool*" were allowed to be shown by parol evidence to have been wool in respect of which they had been previously conversing.

Lord Campbell, C. J., in stating his opinion, said, at p. 981: "When there is a contract for the sale of a specific subject matter, oral evidence may be received for the purpose of shewing what that subject matter was, of every fact within the knowledge of the parties before and at the time of the contract."

I do not see any sound distinction between the sale of matter and its carriage; and so it was competent to shew, by oral evidence, what stone the written contract applied to, and where it was situated to indicate the point from which the carriage would commence.

This, if I am not wrong in finding an analogy between the sale and carriage, in this respect, displaces the objection

as to the sufficiency of the writing to disclose the *termini* of the carriage; and upon the second branch, assuming as must be assumed in dealing with the question, that the evidence of A. W. Parkin is true, that it was agreed between him and Walters that the plaintiffs were to employ and pay the men during loading, that was not necessarily a part of the contract if not implied in it, but collateral to it, and, in consideration of which agreement, he entered into the writing. It would not follow because the defendants might be allowed to shew that the plaintiffs in consideration of the defendants agreeing to haul the stone for 75 cents a cubic yard, promised to pay the men while engaged in loading the scow their wages, that the defendants would also be permitted to show a parol stipulation affecting their own written undertaking and limiting its operations. I am of opinion, however, the stipulations cannot be established by oral evidence if it has the effect of varying or adding to the written contract, and the omission to put it in the writing, is not to be taken as an indication that the intention of the parties was the writing should not evidence the contract, but merely the amount to be paid by the plaintiffs to the defendants for the work.

The contract in this case did not require to be evidenced by a writing, but having been reduced to writing, the writing must govern, unless the circumstances disclosed in evidence bring it within some of the established exceptions to the well defined and (except within such exceptions), inflexible rule, that oral evidence shall not be permitted to alter, vary, add to, or take from the terms of a written contract. What are termed exceptions are not in fact so. One of the so called exceptions is, where by the arrangement of the parties the agreement they have reduced to writing is to have no operation until a certain event happens, that is, though in terms a perfect contract, it is to have no commencement, life or vitality, so to speak, until something occurs which the parties have it in their contemplation, will occur. Such is the case of *Pym v.*

Campbell, 6 E. & B. 370, where the agreement which related to the sale of certain shares in an invention, was made subject to the approval by one Abernethie of the invention, and it was held Abernethie, not approving, the agreement in fact never had a being.

In pronouncing judgment, all the Judges expressed themselves very decidedly that if the agreement had become operative, evidence would have been inadmissible to alter it. Erle, J., said, at p. 373: "The point made is, that this is a written agreement, absolute on the face of it, and that evidence was admitted to shew it was conditional, and if that had been so it would have been wrong. But I am of opinion the evidence shewed that in fact there never was any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence; but in the present case the defence begins one step earlier: the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement till Abernethie was consulted."

Crompton, J., at page 374 said: "If the parties had come to an agreement, though subject to a condition not shewn in the agreement they could not shew the condition, because the agreement on the face of the writing would have been absolute, and could not be varied."

Lord Campbell. C.J., at page 375 said: "No addition to or variation from the terms of a written contract can be made by parol: but in this the defence was that there never was any agreement entered into. Evidence to that effect was admissible."

If, in the case now in judgment, the evidence had been that until the water in Pigeon Creek rose to a certain height the contract should not be binding on the parties, and the water never reached the named height, it would

have come within the *ratio decidendi* in *Pym v. Campbell*.

But the evidence shews the parties intended the contract to exist. At the time it was entered into, the water was of the requisite depth, and the performance of the contract was entered upon; the defendants seeking to relieve themselves from the consequences of not further performing it, by setting up that it was part of the arrangement they were not to be liable if the water fell below the designated point or mark which, according to *Pym v. Campbell*, they cannot be permitted to do.

To the like effect is *Wallace v. Littell*, 11 C. B. N. S. 369, where it was held an agreement for the transfer of a lease was not binding, the parties having agreed that if Lord Sydney should not within a reasonable time consent to the transfer it was to be void; and that it was so agreed could be proved by oral evidence.

In giving judgment, Erle, C. J., said, at p. 375: "It is in analogy with the delivery of a deed as an escrow: it neither varies nor contradicts the writing, but suspends the commencement of the obligation."

The distinction between the suspension of the operation of a written agreement, and a variation of its terms, will be apparent by comparing the last case with *Foster v. Jolly*, 1 C. M. & R. 703, in which it was held, evidence of a parol agreement was inadmissible to establish that it was agreed between the parties that a note payable fourteen days after date, should not become payable if a verdict was recovered in an action brought by other parties. The note was delivered as a note, and the contract thereby shewn was existing, operative and not suspended.

The next so-called exception to the general rule to be considered is, that which comes nearer to the circumstances of the present case, that is to say, where the writing does not contain, and was not intended by the parties to contain, the whole contract between them.

Mr. *Addison*, in his work on Contracts, 8th ed. p. 201, thus refers to the character of omissions that may be supplied and taken with the writing to make out a complete contract: "Oral testimony in aid of insufficient written evidence of contract is admissible when the contract is not required by law to be in writing. If a written document, for example, amounts to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be aided and supported by, oral testimony. Thus, in the case of a contract for work and services, if the names of the contracting parties are not mentioned, or the price to be paid for the work is not specified, or the quantity not named, and the writing consequently does not amount to a contract, oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction is admissible. Such evidence does not alter or add to an existing contract, as no contract exists independently of it."

The case of *Eden v. Blake*, 13 M. & W. 614, referred to in support of the proposition, is a very strong case, having regard to the language of the learned Judge deciding it, against the application of the exception to the present case.

In an auctioneer's catalogue a dressing case was described as silver lined, but before the sale of the article, which was under ten pounds in value, the auctioneer stated the dressing case was not silver lined, and sold it as plated to the defendant.

The auctioneer sued for the price of the case; and it was contended parol evidence was not admissible to contradict the written catalogue; but *Held* that such evidence was admissible, as the article was not sold on the terms of the catalogue. Had the auctioneer signed a writing referring to the catalogue it would have been otherwise.

Chief Baron Pollock, referred to *Shelton v. Livius*, 2 Cr. & J. 411, in which it was so held without disapproval. And Alderson, B. said, at p. 618: "If the auctioneer had

signed a book containing or referring to the catalogue, without making any alteration in it relative to these fittings being plated, and not silver, I should agree that it would not be competent to the opposite party to show that, previous to the bidding the auctioneer had declared the goods to be sold were only plated; because, having subsequently signed in the book a statement that they were silver, it is that subsequent act of signing which binds the purchaser, and not the mere proceeding at the sale."

In *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601, at pp. 609, 610, the late Chief Justice Moss very distinctly adopts and expresses the view, that where the writing does not state the whole contract the true contract may be shewn by parol. His language is: "I agree with the defendants' contention that the verbal agreement cannot properly be designated as collateral to that evidenced by the shipping notes. If that were the sole ground for tendering the evidence, I should be of opinion that it ought to have been rejected in conformity with the principles acted on in *Mason v. Scott*, 22 Gr. 592. But it appears to me that the evidence is receivable on the broad ground that the real contract is not contained, and was not intended to be expressed, in the shipping notes."

But from what follows I am under the impression that very able and distinguished Judge would have held that the evidence sought to be upheld as admissible in this case was not so.

He adds: "They" (the notes) "were not by the compact of the parties made the sole and only authentic media of proof. If there had been a single cargo, the subject matter of the bargain, it might have been reasonable to presume that the parties had expressed the whole of their intention in writing, and that they meant the documentary evidence to be the appropriate repository and memorial of their agreement."

In that case there was an arrangement made between the plaintiff and the defendants' agent for the shipment of oil at different times by the defendants' railway;

and the plaintiffs' contention was that the defendants had agreed to carry the oil in covered cars, and the shipping note which was signed by the plaintiff was for one shipment only and did not contain any reference to covered cars. Had there been, as in the case now under consideration, an agreement in writing, omitting all reference to covered cars, under which the defendants' were to carry the oil, the learned Chief Justice's opinion would have been against the admissibility of the parol evidence to add that term to it. But the case to which the Chief Justice referred as containing a succinct statement of the doctrine, applicable in such cases, in my view, is not in favour of its application to cases such as was then in judgment nor to the present case. It is *Harris v. Rickett*, 4 H. & N. 1.

The matter to be decided was, whether a bill of sale given by a bankrupt was void as an act of bankruptcy, or was saved by an antecedent agreement alleged to have been made by the bankrupt to give such bill of sale to the defendant. The action was brought by the assignee of the bankrupt to recover the chattels assigned by the bankrupt to the defendant under the bill of sale. It appeared that the bankrupt applied to the defendant for an advance of £200, and verbally agreed to give him a bill of sale of all his property to secure repayment. At the time of the advance the bankrupt gave the defendant a promissory note for £200, a memorandum of agreement to assign some property expected on the death of his wife's father, together with a policy of insurance, and also another memorandum to pay £10 yearly as a bonus. Afterwards, on being requested, he executed a bill of sale of all his property to the defendant. The agreement in writing was silent as to the bill of sale, but recited the loan or advance. It was contended by reason of this memorandum in writing, parol evidence was inadmissible to shew that the bankrupt had agreed to give the bill of sale.

The learned Chief Baron Pollock, to whose language Chief Justice Moss referred—see his judgment in *Fitzgerald v. Grand Trunk R. W. Co.*—was as follows, at p. 7: "It was therefore urged that this last writing was all that bound the parties; that it could neither be added to nor varied, and consequently there was, in point of law, no antecedent agreement to give the bill of sale. To this argument we do not assent. It is not necessary to say whether an agreement is conclusive between any but the parties to it and those who claim under them, nor whether the assignees in this case claimed under the bankrupt, nor whether the rule applies when fraud or illegality is to be avoided; but we are of opinion this rule should be discharged, on the ground that the writing does not contain and was not intended to contain the entire obligation of the bankrupt."

I cannot see that this case gives any sanction to the contention that in an action on an agreement in writing, the agreement itself may be varied by parol. It merely determines that the giving of a writing as one of the things stipulated in the verbal agreement between the parties to be given, does not preclude evidence of what the actual agreement was. In other words, it does not make a part performance of the agreement a bar to shewing the agreement itself. Thus stated the absurdity of such a contention is shewn. But I confess the case cited by Mr. Osler of *Chamberlain v. Smith*, 21 U. C. R. 103, decided upon the authority of *Harris v. Rickett* is not reconcilable with an adherence to the general rule against admitting parol evidence to alter a written document. It is true the action was not founded on the written agreement, but on the supposition that the written agreement was only a part performance of the bargain between the parties. It, however, does not afford any countenance to the defendants' contention in the present case.

In *Porteous v. Muir*, 8 O. R. 127, I had occasion to examine and consider the authorities in relation to admitting oral evidence to vary or alter the liability shewn by a promissory note or bill of exchange, and came to the

conclusion that a note given as part of an alleged larger or more extensive bargain, could not be varied in its terms by oral proof of such larger agreement, though such agreement expressly provided that the note should not become payable at the time mentioned in it. Where the question is between the immediate or original parties to the note, there would seem to be no distinction in the principle when it is and when it is not competent to introduce oral evidence to affect the writing between notes and bills and other contracts.

The result I have arrived at on this branch of the case is, that where a writing is given, whether it be a whole contract or only a part of it, where such writing is not intended to operate as a mere acknowledgment or receipt, but embodies or purports to be an undertaking to do or not to do some act or thing, its terms cannot be altered or varied, or contradicted by the parties to it; but that as far as by its terms it is operative, it must be allowed to operate and be held to be the true agreement of the parties, whether it be so or not, except for the purpose of rectifying or amending it on the ground of mutual mistake. Collateral agreements and warranties, the latter being but a branch of the former, may also be called exceptions to the general rule, such agreements are valid, and when the nature of the contract permits, may be proved by parol, if not in opposition to the direct terms of the writing, when the contract evidenced by the writing is the consideration for such parol agreement. See *Morgan v. Griffith*, L. R. 6 Ex. 70; *Angell v. Duke*, L. R. 10 Q. B. 174; *Ellis v. Abell*, 10 A. R. 226; *LaRoche v. O'Hagan*, 1 O. R. 300.

It was suggested in argument that the continuance of the water at the required depth to float the defendants' steamer must be regarded as a matter in contemplation of the parties, and in reference to which they were contracting, so as to suspend the operation of the contract if it turned out, as in this case, there was not sufficient water at the time the work was suspended to enable the defendants to carry it on. But that clearly is not so. It is a

condition of things that ought to have been provided for. It was a matter that might have been foreseen; and if it was deemed likely to affect the ability of the defendants to fulfil their engagement, they ought to have had the stipulation contained in the writing, and not have trusted, if the contention is right that such promise was given, to the plaintiffs' oral promise not to insist upon their doing an impossibility : *Keaton v. Pearson*, 7 H. & N. 386 ; *Grant v. Coverdale*, 51 L. T. N. S. 472.

The case is not analogous to such cases as *Boswell v. Sutherland*, 8 A. R. 233. The performance of the contract by the fall of the water did not become impossible, only more difficult and expensive. On the ground then that the parol evidence was inadmissible to vary the written contract, I am of opinion the judgment for the defendants should be set aside and a new trial had between the parties, with costs to abide the event.

My learned Brothers do not take the same view. I cannot, therefore, say that I feel no doubt of the correctness of my own opinion, but having regard to the contradictory nature of the evidence given, this case exhibits the wisdom of those Judges who, in times past, held, where parties resorted to writing, the writing alone should be the evidence of the agreement of them.

GALT, J.—After the very clear statement of the case by the learned Chief Justice, it is unnecessary for me to set out any of the facts. I propose, therefore, to confine my observations to the one question, viz., does the following letter set forth the whole of the contract between the parties, for I fully concur with him that when an agreement has been reduced to writing the rule is that it cannot be varied by parol evidence :—

" MESSRS. MCNEELY & WALTERS,—

" We will furnish scows and deliver all the stone required for the Omemee Bridge as fast as you require them, for the sum of seventy-five cents per cubic yard.

" We accept the above offer at the price and conditions named."

It appears to me it was necessary to give parol evidence to explain the above contract. There is nothing to show from whence the stone was to be taken, nor by what route it was to be conveyed to Omemee Bridge. All that is definitely settled is the price, viz., seventy-five cents per cubic yard.

It is not shown by whom the stone was to be loaded, and it is plain from the evidence that this must have been done by the plaintiffs, as the article was of such a nature it could not be placed on the scows without the aid of the derrick belonging to them. As respects the route nothing is said; and the question now before us is, whether, in discussing this question, a stipulation can be introduced which does not appear in the writing? The parties were themselves well aware of all the circumstances. The only question they were considering was the price. This arose from the navigation of the route being to a considerable extent artificial; and I do not see how the learned Judge could have rejected the evidence tendered, viz., the question as to the depth of the water and the answer made by plaintiff Walters.

It is true this answer is denied by Walters; but the jury have found in favour of the defendants by their answer to the first question, which is, that the paper did not contain the whole agreement between the parties.

I have given this case the best consideration in my power, and have arrived at the conclusion that the evidence in question was admissible. See the case of *Adamson v. Yeager*, 10 A. R. 477, and the cases therein cited.

I think therefore this rule should be discharged.

ROSE, J.—In *Bennett v. Tregent*, 24 C. P. 565, 568; *McMullen v. Williams*, 5 A. R. 518, 521; *Ellis v. Abell*, 10 A. R. 242-3, 279-80; *Wake v. Harrop*, 6 H. & N. 768, 775, and *Adamson v. Yeager*, 10 A. R. 477, 487, it is held that whether a writing signed by the parties “is the binding record of the contract,” or “did contain the whole of the bargain between the parties or not,” is “a question of fact

to be determined at the trial"—"is a question for the jury."

If so, then the evidence offered herein to show that the writing in question did not contain the whole of the bargain could not have been rejected.

Evidence was received. I need not repeat it. Parkins said that Walters wanted a formal letter acknowledging that they would do the towing for seventy-five cents a yard, and "a document of that kind" was written and signed.

On such evidence the jury have found that the paper did not contain the whole agreement between the parties; and, in my opinion, there was ample evidence to sustain such finding.

If such evidence must have been received, and the finding cannot be impeached as perverse, then how could evidence of what the remaining terms were have been rejected?

Such evidence was received, and the additional terms have been found.

So far as they are in exact accord or do not in any wise affect the memorandum, it seems to be admitted they may be received; but if it can be argued that in any sense they vary the writing produced they must be rejected. What must be rejected? Not the evidence, because if the writing does not contain the whole contract, then we must receive and consider the evidence which is offered to supply the missing terms. Must the findings on such evidence be rejected? It seems to me not necessarily. Draw up the contract as the evidence supplies it, and if there are two contradictory clauses construe the document as in ordinary cases; reconcile them if possible; and, if not, reject the clause supplied by oral testimony. In other words let the facts be found, let the jury say what in their opinion the parties have agreed to; if they have agreed to inconsistent terms which are irreconcilable no greater difficulty of construction will arise than if the whole contract had originally been in writing. The result will not trench upon the rules of evidence, or, in my opinion, upon the decided cases.

Applying this rule and taking the evidence of surrounding circumstances, ascertaining what the parties were contracting about, and taking the findings of the jury, amplify the writing, or rather put in writing the whole agreement, and see if any difficulty of construction arises.

The letter would read somewhat as follows :

"MESSRS. MCNEELY & WALTERS,

"We understand that you have a contract to build the bridge at Omemee, and are desirous of having the required amount of stone taken from your quarries at Bobcaygeon, carried by lake and river to and delivered at Omemee.

"We have scows and two steamers, and if the water is and remains of a certain depth, that is, does not fall below Jacob's water mark to any considerable degree, we will be able to tow all you may require from the quarry through the lake and up the river to the bridge; but if the water falls substantially below that mark it will become impracticable, as our steamers and scows have too great a draft of water to enable us to go up the river when of a less depth.

"It will be necessary for us to ask you to employ our men while the scows are lying at Bobcaygeon and Omemee, who can assist in loading and unloading, you paying their wages. You will of course understand that you are to load and unload, using all due despatch.

"We will also require a man to be placed on the scow by you, at your expense, to take charge of the loading and unloading, he working for you whenever he is not required to take charge of the pumping, subject to the above. We will furnish scows and deliver as fast as you require for the sum of seventy-five cents per cubic yard."

And to this the plaintiff would have replied :

"We accept the above offer at the price and conditions named. We know you cannot do impossibilities; and if the water falls will not expect you to carry the stone."

To the introduction of most of these terms no possible objection could be made, as they admittedly were terms and were carried out, and such a memorandum contains no

terms which could not be readily construed and as readily carried into effect, and on the facts as found were all agreed to.

But taking the memorandum as it reads, it is not clear that the contract must be read so as to prevent the plaintiff unreasonably requiring the stone. In other words, does not the phrase "as fast as you require" mean as fast as you reasonably require the same?

Suppose the morning after the 26th of August the plaintiff had required all the stone needed for the bridge to be placed at the bridge before the night of the 27th, could a refusal to such a demand have entitled the plaintiffs to bring an action? It would hardly be so contended. Why? There is nothing in the paper writing to prevent it—nothing to shew it would be unreasonable. Is it not clear that the enquiry could be had at the trial into the distance the quarry was from the bridge, the number of scows known to be available, the river communication, the quantity of stone required, the time required for loading and unloading. If evidence of all these facts could be supplied, and it seems to me it clearly could on the authority of *Ellis v. Thompson*, 3 M. & W. 445, and similar cases which may be found collected in Mr. *Benjamin's* work, 4 Am. ed., sec. 1023 *et seq.*, then why must not enquiry be made as to the depth of the stream and the reasonableness of requiring the delivery after the fall? If the river had fallen the next day after the contract to say a depth of six inches or one foot, would it have been reasonable to have required delivery? and, if not, is it not a mere question of degree, and, if of degree, then does it not become a question for the jury?

Unless the contract can be read so as to have entitled the plaintiff to have demanded *immediate* delivery of *all* the stone, it seems to me it cannot successfully be argued that the term found by the jury, that the delivery would not be required during low water, is in any sense varying the writing.

If evidence must have been received to supply the place from which the stone was to be carried, the route, the provisions as to loading and unloading, the payment of the men, &c., it seems to me, in the light of the cases I have referred to and the cases therein cited, that the argument must be at an end, and the conclusion be, that the writing placed in evidence was not and was not intended to be the record of the contract but a mere memorandum settling the price, leaving the other terms to be supplied by parol, and that it would not have been proper to have rejected the evidence.

It will be well to remember that the terms of the refusal in this case were in exact accordance with the agreement as found by the jury. It was embodied in a telegram as follows :

“ LINDSAY, Sept. 15, 1885.

“ MCNEELY & WALTERS :

“ Will not load scows until water raises to depth stipulated when agreement made.

“ A. W. PARKIN.”

I agree with my learned Brother Galt. The order *nisi* must be discharged, and with costs.

Order discharged.

[COMMON PLEAS DIVISION.]

THE THAMES NAVIGATION COMPANY, LIMITED, v. REID
ET AL.

Company—Provisional directors—Personal liability—Concealment—Dominion charter.

The plaintiffs, a company incorporated under the Canada Joint Stock Companies Act of 1877, owning two steamers used as pleasure boats in navigating the River Thames, agreed through W. the principal shareholder, to sell them to a company to be formed by B. one of the defendants herein, for \$12,000, \$7,500 in cash, \$4,000 in stock of the new company, and \$500 allowed for repairs. B. procured the stock in the new company to be taken up, and a meeting of the subscribers amongst others, the defendants, was held, when a resolution was passed appointing the defendants the first directors of the company, and requiring half of the stock to be paid up at once, and the balance as the directors should determine, and a charter applied for. The purchase of the vessels was ratified, and the defendants authorized to carry out the same, and the vessels directed to be put in repair. Subsequent meetings were held, at which the repairs were directed, and a manager appointed, and other acts done. The manager, under authority from the defendants, took possession of the vessels, and after \$2,000 had been expended in repairs, one of the vessels was carried away by a flood and wrecked. W. and four other persons owned all the stock in the plaintiff company; four of whom, including W., were subscribers to the amount of \$1,000 each in the new company and promoters thereof; and it was agreed between W. and B. that B. was to get this \$4,000 of stock as compensation for his services in raising the new company, but of this the other defendants had no notice or knowledge. A charter for the new company was never obtained. The defendants stated that they never intended to incur any personal liability. The vessels were proved to be worth the \$12,000. The sum of \$3,500 was paid on the purchase, and this action was to recover the balance due.

Held, that the defendants were personally liable for the amount claimed: that the fact of W. and the other shareholders of the plaintiff company being subscribers to and acting as promoters of the new company, could make no difference, for it was their individual act and not that of the company; nor was the contract vitiated by the omission to communicate to the other defendants the gift of the stock to B. as being a fraudulent concealment; for B. was under no obligation to state his compensation, nor were W. and the three others debarred from giving away their stock; and the defendants were not induced to become subscribers through B.'s subscription.

An objection that the plaintiffs' charter was *ultra vires* of the Dominion Parliament was overruled, there being nothing on the face of the charter to denote that its object was not within the scope of the Dominion Parliament to deal with.

THIS was an action brought to recover from the defendants Nathaniel Reid, William Duffield, John Christie, William Y. Brunton, Alexander McBride, Peter Birtwhistle, and Herbert T. Marsh the sum of \$8,500, being the

balance alleged to be due by the defendants to the plaintiffs, on account of the purchase by the former from the latter of two steamers, called the "Princess Louise," and "Forest City," with all their furniture and appurtenances, for the price or sum of \$12,000; or in the alternative, for damages to said amount for the wrongful conversion of the said steamers.

The cause was tried before Cameron, C. J., without a jury, at London, at the Spring Assizes of 1885.

It appeared that the plaintiffs, a company incorporated under Canada Joint Stock Companies Act 1877, were the owners of the above named steamers, which used to ply as pleasure boats on the river Thames.

By the plaintiffs' charter, they were incorporated for the purpose of "constructing, acquiring, maintaining, and running steam and pleasure boats of any kind, for the purpose of carrying freight and passengers, and to let, hire, or charter said boats; and for acquiring and holding land, (by tenure, freehold or leasehold,) to be used as pleasure grounds and landings; and to keep houses of public entertainment; and for procuring tavern and other licenses for the said houses; having their chief places of business in the city of London, in the Province of Ontario."

It also appeared that the plaintiffs did not intend to run the boats in the year 1883.

All the shares of the capital stock of the company were owned by Dr. William Woodruff, Isaac Waterman, Thomas Smallman, Edwin M. Moore, and another.

According to the evidence of Dr. William Woodruff, the principal shareholder and president of the plaintiffs' company, the boats stopped running in 1881, and he was not willing to let them run any more. He was authorized to make arrangements for their transfer to a new company. He saw the defendant Brunton, who said he thought he could get up a new company. The plaintiffs would sell for \$12,000, \$7,500 in cash, \$4,000 in stock of the new company, and \$500 to be applied in fitting out the boats. Brunton after talking with Woodruff went round to see if

he could, as the witness termed it, float the stock, and then told Woodruff that he could, and asked what he was to get. Woodruff said that if he Woodruff got \$7,500, Brunton could have the stock, that is, the \$4,000 stock as paid up stock. Brunton got parties to become subscribers, and a meeting of these subscribers was held, at which Brunton reported that the full amount of the stock of the new company, which was to be designated "The Thames River Navigation Company," comprising 240 shares of \$50 each, had been subscribed. Among others, the defendants Nathaniel Reid, Wm. Y. Brunton, Peter Birtwhistle, and T. Herbert Marsh were present.

At this meeting it was moved and resolved :

" That the full amount of the capital stock of the Thames River Navigation Company, Limited, having been subscribed, the company be declared organized ; also, that the objects of the company be declared to be the acquisition of the real property, vessels and other personal property and good will of the Thames Navigation Company, and the maintenance of a line of steam and other vessels or boats on the river Thames, and the navigation therewith of the said river at or within seven miles of the city of London ; the construction, acquisition and maintenance of any pleasure grounds, hotels, or places of public resort or entertainment at or within seven miles of the city of London in connection with the said line of steamers : that the number of directors be seven ; and that three form a quorum : that the location of the head office of the company shall be at the city of London or at Spring Bank in the township of Westminster : that Messrs. Nathaniel Reid, William Duffield, John Christie, Wm. Y. Brunton, Alexander McBride, P. Birtwhistle, and T. H. Marsh be the first directors of the company : that one half the amount of each share shall be payable at once to the trustees by this meeting appointed, and that the remaining one half shall be payable at such time and in such manner as the directors shall determine : that W. Y. Brunton, N. Reid, and Mr. J. McBride be trustees to receive from the subscribers for stock the amount of first deposit payable thereon ; and that the amounts received by them be deposited in the Molsons Bank at London : that the directors be instructed to apply for a charter of the company

under the Canada Joint Stock Companies Act, 1877, and that they be authorized to employ as secretary such person as they shall deem proper : that the offer of the Thames Navigation Company, Limited, to sell to this company their assets and good will for the sum of \$12,000, be and the same is hereby accepted, and approved, and the directors instructed to carry into effect the same as soon as possible : that the directors be authorized to take such steps towards putting in proper repair the boats and property to be acquired by the company pending the incorporation of the company as they shall deem proper."

On the first page of the stock subscription book there was written the following proposition :

" The present shareholders of the Thames Navigation Company propose to sell all their right, title and interest in the charter, boats, docks and all other properties of the company for the sum of \$12,000. This offer is free from all debts or liabilities of the company, and on payment of the above amount they will give a conveyance of all the properties of the company, together with the good will," &c. " The above property cost originally \$22,000."

" WILLIAM WOODRUFF, President, T. N. C., Limited."

Following the above on the next page was the undertaking of the subscribers to the new, or Thames River Navigation Company :

" Whereas, it is proposed to form a joint stock company, under the Canada Joint Stock Companies Act, to be called the Thames River Navigation Company, Limited, to purchase from the Thames Navigation Company, Limited, all their boats and personal property, and all their interest in docks and improvements, and all their property of every sort and good will of their business for the sum of \$12,000, free from all incumbrances, debts, and liabilities, of the said Thames Navigation Company, Limited, the capital of such proposed company to be \$12,000, divided into 240 shares of \$50 each. Now we the undersigned hereby respectively agree to take and subscribe for the number of such shares set opposite our respective names, and to pay the amount thereof whenever called upon as hereinafter mentioned. This subscription shall not be binding unless the whole 240 of such shares of \$50 each shall be subscribed

within eight weeks from the date hereof. The number of directors, names of first directors, location of head office, and operations, the time and place for payment of amount of shares subscribed, and name of person to whom to be paid, and all other particulars necessary for the establishment of the company, are to be settled by a two-third majority in value of the votes present at a meeting of subscribers, each subscriber to have one vote for each share.

"Dated the 29th day of January, 1883."

The first signers of the above undertaking were William Woodruff, Isaac Waterman, J. H. Smallman, and E. M. Moore, each for twenty shares, amounting to \$1,000. The defendant N. Reid subscribed for ten shares \$500; P. Birtwhistle two shares \$100; T. Herbert Marsh two shares \$100; John Christie one share \$50; William Duffield one share \$50; W. Y. Brunton two shares \$100, and Alexander McBride (McBride & Boyd) one share \$50.

At a meeting of the directors held on the 19th April, all the defendants except William Duffield being present, tenders for caulking and painting the boats were accepted; and it was resolved that Messrs. Christie, McBride, and Brunton be a working committee.

At a meeting of the directors, held on the 14th May, at which the same directors were present who had been present at the meeting of the 19th April, it was resolved:

"That the president and Messrs. Christie and Marsh, be a committee to enquire the cost of one or two additional steamers; and that we contract for fifty cords of wood with Mr. Teeple."

At a meeting of the directors held on the 4th July, at which all the defendants except Brunton were present, it was resolved:

"That Mr. Mardon be appointed manager at a salary of \$75 per month during the balance of the season."

Mr. Mardon, the manager, was called as a witness for the plaintiffs, and said that he took possession of the boats on the 7th July: that by the instructions of the board of directors he was to get the boats in the water as quickly

as possible. There were men then working, six carpenters, a foreman and three laborers. He got the "Princess Louise" ready first. He got up steam on Saturday afternoon. She would not answer the helm. A flood came afterwards and she was carried down the river on the 11th July, over the dam and broke in two; one part went on the flats, the other went down the river and lodged on the flats three miles below. In the opinion of the witness the boat's hull and engine were worth \$10,000 and the chattels \$500 to \$750. The old company had no possession of the boats after he took possession for the new. Over \$2,000 were spent on the boats before the "Princess Louise" was wrecked.

The sum of \$3,500 was paid on account of the purchase.

Each of the defendants, on his oath, denied that he had purchased the boats, or that he intended to make himself personally liable. The defendant Peter Birtwhistle said he thought the boats were handed over under the authority of the meeting. Mr. Christie said he was not present at the meeting at which the arrangement was made, that is to say, the meeting of the 27th March. Mr. Marsh said, when they took possession they did so under the resolution of the promoters. All the defendants except Brunton also said they were not aware of the arrangement between Dr. Woodruff and Brunton, that the latter was to receive the \$4,000 stock.

Meredith, Q.C., and Fraser appeared for all the defendants except Brunton. The defendants object that the plaintiffs are not entitled to recover. They are not a valid corporation. The object of the corporation was local, and it was *ultra vires* of the Dominion to grant a charter for such purpose. The defendants are not personally liable as the new company was promoted by the old, or the members of the old, and one promoter could not sue another promoter. The only contract established was that the persons forming the new company were to get in the funds and pay, and that until the funds were collected there was no liability

on the individuals to pay except out of the fund. The shareholders of the old company being co-purchasers there could only be a claim in equity, and equity could not assist the plaintiffs on account of the fraud in the concealment of the arrangement between Dr. Woodruff and W. Y. Brunton to give the latter the \$4,000 in paid up stock. The prospectus prepared by Dr. Woodruff shewed the object of the new company was provincial and local and could not be carried out by a Dominion charter, and so the object failed. If the defendants are not liable on contract they are not liable for a conversion. The destruction of the boat by flood was not a conversion, nor the previous use of it, which was an authorized and not a tortious use. If the defendants are liable at all, then Dr. Woodruff, Smallman, Waterman, and Moore, who had authorized what was done, were bound to contribute, and there should be a reference to the Master to ascertain the amount of contribution. There was no evidence to connect Duffield and Christie with the purchase of the boats as they were not present at the meeting of the 27th March, when the purchase was authorized. The law is, that it is only those promoters who actually take part in the proceeding that gives a cause of action that are liable.

Gibbons, for the defendant Brunton, urged the same objections; and contended, that as to the claim of the defendants to be indemnified by Woodruff, Waterman, Smallman, Moore, and Brunton, there was no fraud proved giving right to such indemnity; and fraud would not be inferred or implied.

Osler, Q.C., and *J. H. Flock*, for the plaintiffs. The charter of the plaintiffs till vacated on *sci. fa.* must be taken to be valid, and in a suit like this the defendants cannot go behind the charter. It gives authority to the plaintiffs to navigate anywhere. It is not restricted to any locality. Matters relating to navigation are within the authority of the Dominion Parliament and Government. The claim for indemnity cannot be supported. The alleged fraud cannot be dealt with on

the principles relating to principal and agent or surety. At most the defendants' claim would be for damages in an action of deceit. The defendants were not entitled by the resolution of the 27th March to do anything irregularly, and it did not justify them in buying before the charter was obtained. The defendants except Christie treated the resolution as an immediate contract of purchase, but they were not bound to do so; and at the meeting of the 4th of July, the defendants except Brunton being present appointed a manager, and authorized him to take possession of the boats, and they have had them, and are as to one unable to restore it, so are liable either under the agreement or as for a conversion.

August 21, 1885. CAMERON, C. J.—I am of opinion the plaintiffs are entitled to recover the balance unpaid on the price of the boats. They are, I think, to be regarded as the sellers of the boats to the defendants as the promoters among others of the formation of a new company. They were as directors provisionally appointed before the obtaining of a charter authorized to acquire the boats, and to make the necessary arrangements for so doing. They chose to act upon the power conferred upon them by the resolution of the 27th of March, and as no new company was in fact chartered there was no corporation or person to whom the plaintiffs could look to be paid except the promoters who took part in passing the resolution, and those acting on it. All the defendants were promoters of the proposed new company or corporation, and took part in the purchase from the plaintiffs of the boats, either by authorizing such purchase at the meeting of the 27th March, or by acting therein as directors, and giving authority to their manager, Mardon, to take possession of the boats. If, then, some of the members of the old company had not been promoters of the new, I think there could be no question of the liability of the defendants, unless relieved from such liability by reason of the alleged fraud said to have been practised upon them by concealing the fact that the defen-

dant W. Y. Brunton, was to be the owner of the \$4,000 of stock subscribed for by Messrs. Woodruff, Smallman, Waterman, and Moore.

Thus the defendants' contention presents two grounds of defence for determination on the merits. First, is the fact that Dr. Woodruff was a co-promoter with the defendants of the new company a valid ground of defence.

The plaintiffs are a corporation and so a distinct entity composed of the four gentlemen above named and one other person, at least the latter taking no part apparently in the transaction, and although a corporation must act by individuals the action of such individuals can only bind the corporation when in accordance with the purpose of the incorporation.

It is no part of the powers of the plaintiffs to promote the formation of a new company; and the action of Dr. Woodruff and the other gentlemen above enumerated in assisting in promoting and forming the new company cannot, I think, in law be held to have been the act of the plaintiffs, but their act as individuals, and so not binding upon the plaintiffs, except in so far as what they did or said amounted to a fraudulent representation inducing the defendants to enter into the contract itself. The objection therefore that the plaintiffs were themselves promoters of the new company, and so not entitled to sue their co-promoters, the defendants, is not entitled to prevail.

Then as to the alleged fraud.

It does not appear to me that what is complained of amounted to a fraudulent concealment. The defendant Brunton was not an agent of the defendants, and it does not seem to me that he was bound to disclose to the persons whom he asked to become promoters of the new company the amount of compensation he was to receive for his services in, to use the phrase of Dr. Woodruff, floating the stock of the new company. The evidence shows that the boats were of the value of \$12,000 or thereabouts, and it could not have been contemplated that Dr.

Woodruff and the other members of the old company should not have the right to sell or give away the stock they subscribed for if they thought fit, the concealment of the fact that Dr. Woodruff had agreed with Brunton to have this stock subscribed for by the members of the plaintiffs corporation transferred to him could not, under the circumstances be treated as fraudulent. It was not a matter *dans locum contractui*. The agreement by Dr. Woodruff and the other members of the plaintiff company to subscribe was in fact carried out if it had anything to do with inducing the subscribers to the new stock to become subscribers. If the stock was to be treated as paid up stock, and it certainly was as it was to be part of the price of \$12,000 to be paid for the boats, no contribution from the subscribers therefore could have been looked for; and, if not to be regarded as paid-up stock, its payment would not diminish the liability of the other shareholders for the residue of the price of the boats, which is what the plaintiffs claim.

The case cited by Mr. Fraser, of *Re Hereford and South Wales Waggon and Engineering Co.*, 2 Ch. D. 621, would, on first view, seem to be not dissimilar to the present case, and so to govern it. But when it is considered that was an action by an agent to recover from the liquidators of a company on its being wound up compensation for his services to his principals, the case will be found to be not analogous to the present. The plaintiffs had entered into an agreement with the owner of certain Iron Works, by which it was stipulated if they should succeed in forming a joint stock company for the purchase of the iron works, at a valuation to be made by a Mr. Bramwell, they should receive out of the purchase money £1,500 as promotion money, and such promotion money was not to prevent the plaintiffs from obtaining from the company pay for their services in getting up and registering the company. The owner of the iron works executed a deed to Walter, one of the plaintiffs, as trustee for the intended company, by which the owner agreed to sell his interest

for £5,000 paid up stock and £9,974 10s. in cash. If the company was not formed in three months the deed was to be void. The company was not formed within the three months ; but Walter introduced the matter to seven gentlemen, who agreed to join the proposed company and take shares in it. The company was formed, but there were no other shareholders than the seven persons who had been induced by Walter to take stock. These stockholders were the directors and confirmed the deed of trust to the plaintiff Walter. An order was afterwards made for winding up the company. The plaintiffs claimed for compensation for services rendered both before and after the registration of the articles of association. The liquidators opposed these claims on the ground that the above agreement as to promotion money had not been disclosed to the seven shareholders and directors. These claims were allowed by the Chief Clerk to Vice-Chancellor Hall, with that learned Judge's approval, but on appeal they were disallowed. The concealment of the agreement as to £1,500 was held to constitute a fraud, and as the shareholders had been by fraud induced to join the company, and as the company had received no benefit from the services of the plaintiffs, they could not claim from the company compensation for those services. While Mr. Justice Mellish, in delivering the judgment of the Court of Appeal, seems to have laid down as a proposition in law, at p. 626 : " That if the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which, if the company was successful, it would be unjust and inequitable to allow him to retain, and the company proves abortive and is ordered to be wound up without doing any business, the promoter cannot be allowed to prove against the company in the winding up, either in respect of his services in forming the company, or in respect of his services as an officer of the company after the company was registered : " the *ratio decidendi* is contained in the fact that the seven gentlemen who became shareholders and

directors were induced to do so to carry out the agreement that the plaintiffs had made with the owner of the iron works, and were entitled to be made acquainted with the whole of the agreement and not with merely a part only. There was in fact a fiduciary relationship between the plaintiffs and the persons they induced to enter the company.

In the present instance there is nothing of that kind. There was no stipulation between the plaintiffs in this case and the defendant Brunton that the latter should become a shareholder or director. He was merely an agent employed by the plaintiffs to effect a sale of their effects, and to be paid for so doing a part of the price at which he was authorized to sell. There were 115 subscribers to the stock book before the defendant Brunton subscribed for the two shares of which he was to be the holder, and it cannot be said that the subscriptions were made in respect of Brunton's connection with the company.

I do not think a purchaser of goods is at liberty to repudiate his purchase in the absence of misrepresentation, because the seller agreed to give an agent an excessive remuneration to induce him to make greater exertion to effect a sale. The subscribers to the present undertaking were not induced to buy through any misrepresentation. They were desirous of having the boats run from the indirect benefit that might accrue to the most of them as business men, from the hoped for attraction this would prove in bringing people and business to the city of London. It was no concern of theirs what any agent of the plaintiffs might receive for his services in getting subscribers when there was no misrepresentation made to induce them to subscribe.

I do not think any of the subscribers supposed he was incurring any liability beyond the price of the stock he subscribed for, nor did any of them intend to become liable to any greater extent. If their liability depended upon their intention in this respect, they would not have incurred any liability. But I do not think it does depend upon their intention. They bought and took possession of the

boats. There is no one else responsible to the plaintiffs for them, and the boats, they are not in a position to restore.

I am therefore of opinion they are liable to the plaintiffs for the price of the boats, and that the plaintiffs are entitled to be paid the amount unpaid on the agreed price, that is to say, \$3,349.83, with interest from the 1st of September, 1883.

I have not overlooked the defendants' objection to the legality of the plaintiffs' incorporation. But there is nothing on the face of the charter to denote that its object was not within the scope of the Dominion Parliament to deal with. Though the probable intention was to confine the operations of the company to the river Thames in the neighbourhood of the city of London, the charter would authorize the company to navigate its vessels wherever it might be disposed to use them; and assuming that the question of the legality of the corporation could be raised by these defendants who have expressly recognized their corporate existence, or at all events their existence by the name by which they have sued, as to which I give no opinion, I cannot say on the material before me that the charter is invalid. I do not think there is anything either in the objection that the prospectus framed by Dr. Woodruff, shews that the new company was to be incorporated for a local object merely, that circumstances has no bearing upon the question of the defendants' liability.

I do not think in this action the question of contribution by any of the other shareholders should be dealt with, and therefore shall express no opinion as to whether any case has been made out for contribution as against any of the subscribers to the new company other than the defendants. It has turned out a most unfortunate affair, and it is to be regretted that these defendants, who were not intending to incur the large liability imposed upon them, should have to make good the considerable balance still claimed by the plaintiffs; but I think the law casts the burden upon the defendants, and they must bear it.

Judgment for the plaintiffs.

[COMMON PLEAS DIVISION.]

FOX V. SYMINGTON ET AL.

Interpleader—Division Court—Bailiff—Protection of—48 Vic. ch. 14, sec. 6, sub-sec. 3.

By 48 Vic. ch. 14, sec. 6, sub-sec. 3, (O.,) provision is made for the Judge of the Division Court in interpleader proceedings adjudicating upon the claim, and making such order between the parties in respect thereof, &c., as to him may seem fit; and also for adjudicating between such parties, or either of them, and the bailiff, in respect of any damage or claim of or to damages arising or capable of arising out of the execution of such process by such bailiff, and making such order, &c.

Held, that the provisions of the section were for the protection of the bailiff; and were not applicable to any claim for damages as between the claimant and the execution creditors.

ACTION against the defendants alleging that the defendants by their servants or agents broke and entered into the plaintiff's house and store and turned the plaintiff out of possession, and took possession thereof, and of the groceries stock-in-trade, goods, and chattels therein, and converted the same to their own use.

The defendants by their statement of defence alleged that at the time in question a writ of attachment issued out of the first Division Court of the county of Lambton, against George A. Staniland; and the bailiff of the Court, acting under such attachment, seized the groceries, stock-in-trade, &c., to satisfy the defendants' claim against the said George A. Staniland, which is the trespass complained off; and by the third paragraph alleged that at the time of such seizure, &c., the plaintiff claimed the goods as his, whereupon the bailiff caused an interpleader summons to be issued out of the said Division Court, wherein the defendants herein were plaintiffs, Geo. A. Staniland defendant, and the plaintiff herein the claimant; and on the return thereof, the now plaintiff's claim to the said goods and his claim for the damages suffered by him in respect to such seizure, was only adjudicated upon by the Judge of the said Division Court, and the said Judge acting under the Act, 48 Vic. ch. 14, sec. 6, sub-sec. 3, and sec.

7, (O.), adjudicated in respect to the said damages suffered by the plaintiff under the said seizure, which was the act and trespass complained of, and certified that no proof of any damages had been given to him, and that no claim was made for damages; and therefore he stated that he made no order as against the execution creditors as to damages.

To the third paragraph of the statement of defence, the plaintiff demurred, on the ground, that the statute 48 Vic. ch. 14, sec. 6, sub-sec. 3, and sec. 7, (O.), only applied to claims for damages as between the claimant or execution creditors on the one hand, and the officer and bailiff on the other, and are only provisions for the further protection of the bailiff; and the said sections are not applicable to any claim for damages as between the claimant and the execution creditor.

On September 18, 1885, the demurrer was argued.

Falconbridge, for the demurrer.

Lash, Q. C., contra.

September 18, 1885. WILSON, C. J.—I am of the opinion the power given to the Judge in Division Court interpleader proceedings was for the protection of the bailiff only.

The 48 Vic. ch. 14, sec. 6, sub-sec. 3, (O.), provides, firstly: for the Judge adjudicating "*upon the claim*," and making "such order between the parties in *respect thereof*, and the *costs of the proceedings*, as to him seems fit."

Then the Act provides as to *damages*; and it provides as follows: "and shall also adjudicate *between such parties*, or *either of them*, and *such officer or bailiff*, in respect of any damage or claim of or to damages arising or capable of arising out of the execution of such process *by such officer or bailiff*, and make such order in respect thereof, and of the costs of any proceedings as to the Judge shall seem fit."

That enactment expressly provides as to damages being such as shall lie between such parties or either of

them *on the one hand*, and such officer or bailiff *on the other hand*.

The bailiff being a public officer is entitled to special protection in the performance of his duty. He is bound to act, and it is not right he should be obliged to act at his own peril.

The execution creditor compels him to go on. The debtor or a claimant threatens him with an action if he do go on. While the bailiff is in fact an indifferent party, and is entitled to be protected as far as possible.

But the execution creditor is voluntarily proceeding on his writ, and he should be answerable for his own voluntary acts.

I give judgment therefore for the plaintiff on the demurrer, with costs.

Judgment for plaintiff.



A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME
BEING DECISIONS IN THE
QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY
DIVISIONS.
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO.

ABATEMENT.

See FRAUD AND MISREPRESENTATION, 2.

ACCIDENT.

See MUNICIPAL CORPORATIONS, 2.

ACQUIESCENCE.

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ACTION.

Selecting form of.]—See MORTGAGE, 2.

AGENT.

Station Agents of Railway Cos. acting as agents of Express Cos.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

ALIMONY.

See FOREIGN JUDGMENT, 1.

AMENDMENT.

See INSURANCE—PLANS.

AMENDMENT AT LAW.

Judgment—Amendment affecting stranger—Setting aside at instance of stranger—Locus standi.]—An order

was made by the Master-in-Chambers amending a judgment entered against C. as executrix, so as to make it a judgment against her personally; and also amending the writs of *fi. fa.* in the sheriff's hands, so as to be conformable with the judgment as amended. The order was made *nunc pro tunc* upon the allegation that all parties interested had consented, and that an execution at the suit of the M. Co. against C. personally had expired. On an application made by the M. Co. to set aside the order, on the ground that their writ had not expired, but was in full force, and that the effect of the amendment was to give plaintiff's writ priority, the Master made an order setting aside his previous order, and directing the amendments made thereunder to be struck out.

On motion by way of appeal to the Divisional Court to rescind the last named order,

Held, CAMERON, C. J., dissenting, that the motion must be refused; for that though the M. Co. were strangers to the action in which the amendments were made, they had a *locus standi* to apply to have the same set aside. *Glass v. Cameron*, 712.

APPEAL.

Stay of proceedings, pending.]—*See ASSESSMENT AND TAXES*, 3.

To Sessions.]—*See VAGRANT*.

See ARBITRATION AND AWARD.

ARBITRATION AND AWARD.

Misconduct of arbitrator, what constitutes—Reception and rejection

of evidence—*R. S. O. ch. 50, sec. 289—Investigation of long accounts—Consent reference—Right of appeal.*]—The improper reception or rejection of evidence by an arbitrator, without any corrupt intent, does not amount to legal misconduct upon which an award will be set aside.

The evidence received consisted in statements made by the plaintiff *ante litem motam* in substance confirmatory of his evidence before the arbitrator; and the rejection consisted in the arbitrator's refusal to receive part of the plaintiff's examination without the whole being received. It did not appear that the arbitrator was influenced by the evidence objected to, and he made no request to be allowed to reconsider his award.

Held, that while the evidence objected to was not strictly admissible, the award could not be interfered with on such ground, and especially so since *R. S. O. ch. 50, sec. 289*, when it did not appear to have occasioned any miscarriage on the merits.

The order of reference made by the presiding Judge at the Assizes was: "Upon the consent of the parties, I do order and direct that the matters in dispute between the plain- and defendant upon the issues joined in this action be referred," &c. It was urged that the action being one which involved the investigation of long accounts, the reference must be deemed to have been made compulsorily, and the consent, to have been merely to the arbitrator named. It appeared that, as a matter of fact, the learned Judge exercised no discretion, but, on the parties announcing their consent, he made the order, and at the time suggested the insertion of a clause authorizing an appeal, if

such were desired, but it was not required.

Held, that the reference was a consent reference, and there was no appeal.

Actions involving the investigation of long accounts will not be referred as a matter of course. There is nothing to prevent parties agreeing to a consent reference of all matters in dispute in an action, even though involving investigation of long accounts. *Webster v. Haggart et al.* 27.

See MUNICIPAL CORPORATIONS 7.

ATTORNEY GENERAL

Intervention of.—See PATENT OF INVENTION, 3.

ASSESSMENT AND TAXES.

1. *Invalid assessment—Sale—Validity*—R. S. O. ch. 180, sec. 156, *construction of.*—In the year 1875 a lot of land, containing 200 acres and patented as one lot, was assessed on the resident roll as lot 114, 200 acres, value \$1,000. From 1876 to 1878 it was similarly assessed. In 1879 it was also so assessed, except that the quantity of land was stated to be 100 instead of 200 acres. The whole 200 acres was occupied by a tenant, who duly paid the taxes for each year, including 1879. On the non-resident roll for 1879 the east half of the lot appeared assessed as 100 acres, value \$800. By reason thereof it was returned to the county treasurer as in arrear for the taxes of 1879, and a sale thereof made.

Held, the sale for taxes was invalid: that the assessment on the resident roll for 1879 was of the whole lot upon which the taxes were paid, the mistake in stating the quantity of land to be 100 acres not making such assessment less an assessment of the whole lot, while the error of putting the east half on the non-resident roll could not affect the owner's right to the land.

Quere, as to the effect of the curative provisions of sec. 156 of the Assessment Act, R. S. O. ch. 180, since [the decision of the Supreme Court, in *McKay v. Cryslar*, 3 S. C. R. 436, and whether a tax deed may be questioned for irregularities in the assessment or in the proceedings prior to sale after the lapse of the two years. *Jeffery v. Hewis*, 364.

2. *Tax sale—Sale for more than really due—Irregularity—Matter of procedure—Owner present at tax sale—Estoppel—Laches—De minimis non curat lex*—R. S. O. c. 180, s. 155.]—Certain lands, worth from \$600 to \$800, having been sold in November, 1881, for \$6.06 taxes, being one-eleventh in excess of taxes really due.

Held, that it vitiated the sale, and R. S. O. ch. 180, sec. 155, did not cure the error, and the maxim *de minimis non curat lex* did not apply.

It was further objected to the regularity of the said sale that in 1881 neither the assessor nor the clerk returned the lands as occupied, as in fact they were, and further that the clerk did not examine the assessment roll when returned by the assessor, as required by R. S. O. ch. 180, sec. 111.

Semble, that these are matters of procedure only, and would be cured by sec. 155.

It was proved that the owner was himself present at the sale in question, and purchased one lot which was ten or eleven ahead of the lot in question, and also another lot three below it on the list; but it was not shewn that he was present when the actual lot in question was sold.

Held, that he was not estopped by conduct from complaining of the sale.

Held, also, that the fact that the owner was informed within three months of the sale of the lot having been sold, when he might have deemed it, would not deprive him of his right of action. *Claxton v. Shibley et al.*, 451.

3. *Injunction—Assessment—Court of Revision—Fraud—Jurisdiction—Costs—Demurrer ore tenus—Stay of proceedings pending an appeal—37 Vic. ch. 65 O.*—Where plaintiffs alleged in their statement of claim that they had appealed in respect of the assessment of their property to a certain Court of Revision; and that the members of the Court, by a fraudulent conspiracy among themselves, and from interested motives, in face of facts leading obviously to a contrary conclusion, and without any evidence to support the same, had not only dismissed the appeal, but, on a cross-appeal brought in respect of the said assessment as too low, had greatly increased the amount thereof.

Held, by FERGUSON, J., on demurrer *ore tenus*, that inasmuch as an appeal lay from the Court of Revision to the stipendiary magistrate the plaintiffs should have appealed accordingly, and could not come to this Court for an injunction, at least until they had exhausted their other remedies.

The above judgment having been given, the plaintiffs applied for a stay of proceedings pending a rehearing on appeal.

Held, by FERGUSON, J., that there was jurisdiction to make the order, notwithstanding that the action was dismissed, and the order might go upon terms.

At any time before formal judgment issued by the Court, the judgment or part of it may be recalled, and a term imposed or a change made.

On an appeal from the judgment of Ferguson, J., to the Divisional Court, the Court was divided except as to the costs, and the judgment appealed from was therefore sustained.

Per BOYD, C.—The claim of the plaintiffs to the interference of this Court is not one of absolute right, but one resting on judicial discretion, and that discretion was rightly exercised in dismissing the action. The stipendiary magistrate has power to deal with the matters in question in the most ample manner. The Statute intends that the value of lands shall be fixed by the municipal authorities, and not until all statutory means have been exhausted should recourse be had to this Court for relief. As to costs the defendants are to blame for not having placed a demurrer on the record, and so had the preliminary question of law decided before the trial. The costs of the motion for injunction should be given to the defendants, and further costs should be given thereafter as if the defendants had successfully demurred; and the costs of this appeal should be given thereafter as if the defendants had successfully demurred; and the costs of this appeal should be given to the defendants.

Per PROUDFOOT, J.—The special

Act for the Territorial Division of Haliburton, R. S. O. ch. 6, sec. 23, gives an appeal to the stipendiary magistrate against any *decision* of the Court of Revision. The action of the Court was a mere travesty of a judicial proceeding. The function of the Court was judicial to hear and determine. The action of the Court in deciding in opposition to the only evidence given before them appears to establish that the whole was a fraudulent arrangement by the members of the Court of Revision. To give the stipendiary magistrate jurisdiction the court of Revision must have given a *decision*. The admission, by demurring, that the action of the Court was fraudulent in effect determines that there was no *decision*. It was not intended by the Legislature that it should be the duty of the stipendiary magistrate to enquire into fraudulent proceedings of the Court of Revision, but to consider whether an honest decision was to be revised. If this Court has jurisdiction, as it certainly has, where the acts complained of are vitiated by fraud, it cannot refuse to entertain the suit because the plaintiffs may have another and perhaps a more convenient remedy. He agreed with the Chancellor as regards the costs. *Canadian Land and Emigration Co. v. The Municipality of Dysart et al.* 495.

4. *Assessment and taxes—Right to deduct taxes from rent—Assessment roll—Sufficiency of description of property in—Demand—Distress—Laches—R. S. O. ch. 180, secs. 12, 21, 57, 100.*—Certain property in the city of Toronto had been owned by B., and on his death in 1884, intestate, and without known heirs, defendant entered and leased the property to the plaintiff, the defen-

dant agreeing to pay the taxes. In 1884 the taxes assessed for 1883 not having been paid, a distress was entered therefor, when the plaintiff paid them and claimed to deduct them from the rent. The assessment for 1883 was against B. as owner, of which he received notice, and he was similarly assessed and received notice for the two prior years. In the assessment roll the name of the street and property was given, but not the number of the house or lot, except an arbitrary number adopted by the assessment department for their convenience, and without information from the department the lots could not be discovered.

Held, that sec. 21 of the Assessment Act, R. S. O. ch. 180, which, in the absence of an agreement to the contrary, authorizes the tenant to deduct the taxes paid by him from his rent, only does so when he could be compelled to pay the same; and as, following *Chamberlain v. Turner*, 31 C. P. 490, there appeared to be no valid demand here, there was no right to collect the taxes, and therefore no right to deduct the same.

Quære, whether the description in the assessment roll was sufficient; but under the circumstances, and in view of the provisions of sec. 57, validating the roll as finally passed by the Court of Revision, B. probably could not have raised this objection to a distress or suit for the taxes.

Semble, where there is a sufficient distress on the property, and the municipality by its own laches puts it out of its power to distrain, sec. 100 does not avail to give the right to collect by action. *Carson v. Veitch*, 706.

BAIL.

*Recognizance of special bail—Judge's order to hold to bail—Non-liability of bail beyond amount mentioned therein.]—*A Judge's order to hold to bail in the sum of \$300, was obtained in an action of tort, in which the affidavit swore to a cause of action for \$500. The bail piece was in the usual form, stating: "Bail for \$300 by order of," &c. The recognizance of bail was in the words of the statute, namely: "You," the bail "do jointly and severally undertake that if" the defendant in the original action shall be condemned, then he shall pay the cost and condemnation money, or render himself to the custody of the sheriff," &c., "or you will do so for him." Rule 89 of T. T. 1856, provides that "the bail shall only be liable for the sum sworn to by the affidavit of debt and costs of suit, not exceeding in the whole the amount of their recognizance." In the original action a verdict was obtained against the defendant for \$400, and \$125.28 costs. In an action on the recognizance against the bail.

Held, CAMERON, C. J. dissenting, that the undertaking in the recognizance to pay the condemnation money, read in connection with Rule 89, meant the amount mentioned in the Judge's order; and therefore the bail in this action were only liable for the \$300, the amount mentioned in the Judge's order, and the costs of the original and of this action.

The reasonableness of having the recognizance express its meaning in simple language, instead of adhering to a form of words adapted to meet a different practice, suggested. *Baker v. Jackson*, 661.

BAILIFF.

Protection of.]—See INTERPLEADER

BANKRUPTCY AND
INSOLVENCY.

1. *Ejectment—Insolvent Act of 1875, secs. 68, 75—Proceedings under—Validity—Right of stranger to question—Possession—Damages.]—*In ejectment plaintiff claimed title under a deed from the assignee in insolvency of P. D. Prior to the issue of the writ of attachment in insolvency P. D. had conveyed the property to his brother L. D. Two of the creditors claimed that the deed was fraudulent, and made a demand under sec. 68 of the Insolvent Act of 1875 on the assignee to take proceedings to have the deed set aside, which the assignee, on instructions from the creditors, refused to do, whereupon the two creditors obtained from the Judge an order under that section authorizing them to take the proceedings on their own behalf. Proceedings were thereupon taken and the deed set aside. The land was advertised, the period therefor being shortened by the Judge, and was sold to F., but in reality to the plaintiff to whom F. conveyed. The assignee was notified of the sale and requested to execute a conveyance to the purchaser, which, under instructions from the creditors, he refused to do, whereupon an order was obtained from the Judge directing the assignee to execute the deed, the assignee's solicitor attending and opposing the making or the order.

Under sec. 68 the "benefit derived from such proceedings shall belong exclusively to the creditor instituting

the same for his benefit;" and under sec. 75, no sale is to be completed unless it "has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose, or by the inspectors;" and also the period of the advertisement might be shortened "by the creditors with the approval of the Judge."

Held, ROSE, J., dissenting, that the sale and the deed thereunder were valid.

Per GALT, J.—The effect of sec. 68 was to withdraw the property from the general body of creditors, and to vest it in the litigating creditors; and, so far as regards proceeding under this section, creditors when referred to in the statute meant litigating creditors, and not the general body of creditors; and the sale having being sanctioned by such litigating creditors, sec. 78 had been complied with.

Per CAMERON, C.J.—Under sec. 68 the benefit to accrue from the proceeding passed from the estate to the litigating creditors; and the sanction of all the creditors referred to in sec. 78 was not requisite; but even if it were, the defendant, a mere stranger to the insolvency proceedings, was not in a position to raise the objection.

Per CAMERON, C.J., also.—An assignee under the Insolvent Act 1875, is not merely the executor of a power, but takes the legal estate, which on conveyance by him vests in his grantee clothed with the trusts with which it was invested in the assignee.

Per ROSE, J.—The meaning of sec. 68 was not that the litigating creditors were to have the exclusive benefit of the proceeding without the limitation, but merely the benefit thereof

as creditors, that is, payment of their debts in full; but any surplus must go to the other creditors: that on the deed to L. D. being set aside the property did not vest in the litigating creditors, but was in the assignee, who held it in trust to so distribute it, and this being a matter for the general benefit of the creditors it was subject to the other provisions of the Act, and therefore to the provisions of sec. 78, which had not been complied with, so that no sale was made, and no title passed thereunder.

Re Jarvis v. Cooke, 28 Gr. 303, considered and commented on.

The defendant set up that he had a title by possession, and that the title was outstanding in a mortgage; but the evidence failed to establish it. *Donovan v. Herbert*, 89.

2. *Creditors suit—Chattel Mortgage void against creditors—Pressure—Simple contract creditors—Assignment for benefit of creditors—Suit on behalf of all creditors except preferred ones—Parties—Locus standi.*]

—McC. & Co., creditors of C., knowing him to be insolvent, persuaded him to give them a chattel mortgage on all his property, by representing to him that, if he gave it, it would protect him against his other creditors and that they would also protect him, and would not enforce the mortgage unless his other creditors took proceedings against him.

Held, on action brought by certain simple contract creditors of C. on behalf of themselves and all his other creditors, that the chattel mortgage must be set aside as a fraudulent preference, and that the doctrine of *pressure* had no application to the case.

Held, also, that the fact that the

plaintiffs excluded McC. & Co. from the creditors on whose behalf they were suing, was not a valid objection to the action.

Held, further, that the fact that the plaintiffs were simple contract creditors only, and that the mortgagors had, prior to action brought, made an assignment for the benefit of creditors generally, and that the plaintiffs were not attacking the assignment as well as the mortgage, did not debar them from the relief claimed.

Meriden Silver Co. v. Lee, 2 O.R. 451, followed. *Macdonald v. McColl et al.*, 185.

3. Chattel Mortgage Act—Sufficiency of description of goods—Necessity for change of possession—R.S.O. ch. 119, sec. 23—Interphad r.]—The president and secretary of an incorporated company, which was insolvent, executed an assignment to trustees for creditors of all the real estate of the company, and also of "All and singular the personal estate and effects, stock in trade, goods, chattels, rights and credits, fixtures, book debts, notes, accounts, books of account choses in action, and all other the personal estate and effects whatsoever and wheresoever, and whether upon the premises where the company's business is now carried on or elsewhere, which the company is possessed of or entitled to in any way whatsoever."

Held, that the description of the goods was not sufficient within the meaning of R. S. O. ch 119, sec. 23, and that therefore and inasmuch as the evidence showed that there was no immediate delivery of the goods to the trustees, followed by an actual and continued change of possession of them, the assignment of them was invalid.

Corsecallen v. Moodie, 15 U. C. R. 92, and *Nolan v. Donnelly*, 4 O. R. 449, considered and followed. *Whiting et al. v. Hovey et al.*, 314.

BANKS.

Pledge of timber limits to bank—Security for future advances—Invalid mortgage—Party entitled absolutely, voluntarily restricting his claim to a lien—Judgment—Quebec regulations as to timber on Crown lands—34 Vic. ch. 5 D. secs. 40, 41—Parties—The Crown—Locus standi.]—Section 28 of the revised regulations respecting the sale and management of timber on Crown lands in Quebec provides that "Limit holders, in order to enable them to obtain advances necessary for their operations, shall have a right to pledge their limits as security without a bonus becoming payable," and it further provides that "if the party giving such pledge shall fail to perform his obligations towards his creditors, the latter * * may obtain the next renewal in his or their own name subject to payment of the bonus, the transfer being then deemed complete." In 1875 and 1876 one F., who was now represented by the plaintiffs, procured for the purpose of his business operations as a lumberman, certain pecuniary advances from the defendants, the National Bank, through B, their local manager, and to secure repayment, gave to the defendants certain promissory notes and valuable securities, and as collateral security also gave a written pledge, dated September 21st, 1876, of certain timber limits in Quebec, which pledge purported on its face to be "for advances made and to be made," to him. In

1877, with the consent of B., F. cancelled this supposed pledge, and gave what purported to be a new pledge of the licenses to the National Bank, which simply stated that he thereby pledged all his rights, titles, and interests in the licenses to the defendants, and which new pledge was indorsed on subsequent renewals of the licenses. The defendants did not at any time bind themselves to make any further advances to F. but as a matter of fact in 1877, 1878, and 1879, F. continued to receive advances from the defendants. In 1882, F. being still indebted to them in a large sum, and the pledge of the timber limits still in force, the defendants, pursuant to the above section of the regulations, obtained an issue of the licenses directly to themselves. The plaintiff now brought this action for discovery of the securities held by the defendants on account of F.'s indebtedness, and for redemption, and for the declaration that the defendants had no lien on the timber limits in question.

Held, that as to the advances made before the pledge was given the security was valid, but that as to the future advances, the pledge of the timber limits was invalid as being in contravention of 34 Vic. ch. 5 D. sec. 40.

Held, however, that inasmuch as the defendants, although they had obtained the issue of the license directly to themselves, and thus procured a complete title to the property, under the above section of the regulations, nevertheless voluntarily restricted their claim to a lien upon it for the whole amount of F.'s indebtedness, they were entitled to judgment declaring such lien, and that on payment of such indebtedness the defendants should convey the property to the plaintiffs.

Held, further, that it was open to the plaintiffs in this action to object to the transaction as contravening the Banking Acts, and it was not necessary for the purpose of such objection that the proceedings should be by the Crown.

Semble, that if a mortgage upon lands be given to a bank as security for future advances in contravention of the Banking Acts, and after the debt has been contracted or advances made, another mortgage be executed upon the same property as additional security for the debt so contracted or advances made, the second mortgage will be valid. *Grant et al. v. La Banque Nationale*, 411.

See BILLS OF LADING AND WAREHOUSE RECEIPTS.

BARRISTERS.

English barrister—Right to practice in Ontario—Admission through Law Society.—*Held*, that to entitle an English barrister to practice at the bar of Her Majesty's Courts in Ontario, he must be admitted to practice through the Law Society of the Province. *In re De Souza*, 39.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Non-negotiable promissory note—Right to recover—Pleading.—The statement of claim was, that the defendant, being a director of a company, jointly and severally with three others, made a promissory note payable to said company, with the intent that it should be used by the company upon the credit of the makers for the purposes of the com-

pany, and the company indemnified the makers against liability thereon: that the plaintiff discounted the note for the company, and with the knowledge and consent of the defendant, paid the proceeds to the company, and the money was applied to the purposes of the company, and that after default in payment the defendant gave security to the plaintiffs against his liability upon he note.

Held, on demurrer, statement of claim good, and that the plaintiffs were entitled to recover against the defendant the amount of the note, though not a negotiable instrument. *Bank of Hamilton v. Harvey*, 655.

See CORPORATIONS, 1—FRAUD AND MISREPRESENTATION, 1—BILLS OF LADING AND WAREHOUSE RECEIPTS.

BILLS OF LADING AND WAREHOUSE RECEIPTS.

Warehouse receipts—Validity of—Banking Act—Negotiation of note—Commingling of property—Tracing property covered by receipts—Affidavit evidence.]—T., a miller, gave warehouse receipts for wheat to the plaintiffs attached to notes made by him, payable to their order to take up his overdue notes which were secured by like receipts. The receipts were in the following form: "Received in store in my warehouse or mill from farmers, 2,000 bushels of wheat, to be delivered to the order of myself, to be endorsed hereon. This is to be regarded as a receipt under the provisions of Statute 43 Vic. ch. 22. The said wheat is separate from and will be kept separate and distinguishable from other grain." The receipts were endorsed in blank. T. did not

keep the wheat covered by the receipts distinct, but ground some of it into flour and allowed the remainder to be mixed with wheat subsequently brought in by farmers and others. Before assigning in trust for creditors he pointed out to the plaintiffs one carload of flour made from the wheat covered by the receipts, and the next day the bank took possession. The evidence showed that there was about the same quantity of wheat and flour in and about the mill at the date of the last receipt as there was in dispute in this interpleader. T. subsequently assigned, and the defendants afterwards recovered a judgment against him. In an interpleader action to try the right of the bank under their warehouse receipts as against the defendants under their execution,

Held, that a special indorsement of the receipts to the plaintiffs was not essential, and that the endorsement in blank of the receipts satisfied all the requirements of the Bankin. Act, that Act not specifying any particular mode in which the property in the receipt is to be transferred, and that the notes and receipts attached might be read together.

Held, also, that the mode of acquiring the receipts, viz., by delivering up the overdue notes with receipts, was unobjectionable, the transaction being in fact a negotiation of the notes by the surrender of the antecedent lien upon the wheat of T.; or at any rate there was a mere substitution or continuation of securities according to the original understanding of the parties.

Held, also, that T. having undertaken to keep "the grain separate and distinguishable from other grain," and having failed to do so, it became his duty to enable the plaintiffs to

recover what the receipts called for, or its equivalent, and having done this while able to dispose of his property, the warehouse receipts attached upon the property so indicated by him, and the plaintiffs were entitled to succeed against the execution creditors. *The Bank of Hamilton v. The John T. Noye Manufacturing Co.*, 631.

BILLS OF SALE AND CHATEL MORTGAGES.

See FRAUDULENT CONVEYANCES, 1—BANKRUPTCY AND INSOLVENCY, 2, 3—FIXTURES.

BRIBERY.

See CANADA TEMPERANCE ACT, 1878.

BUILDING CONTRACT.

See WORK AND LABOR.

BY-LAW.

See MUNICIPAL CORPORATIONS, 4, 6.

CABS.

See MUNICIPAL CORPORATIONS, 4.

CANADA TEMPERANCE ACT, 1878.

41 Vic. ch. 16, secs. 61, 62, 63—*Scrutiny—Power of County Court Judge—Mandamus.*—A County Court Judge will not be compelled by *mandamus* to enquire, on a scrutiny of ballot papers, under secs. 61, 62, 63, of the Canada Temperance Act 1878, (1) as to personation, (2) bribery, (3) the status on the voters' list of persons voting. *In the matter of the Canada Temperance Act of 1878, and Amending Acts, and in*

the matter of a Poll holden in the City of St. Thomas, on the 19th of March, 1885,—154.

CANAL.

See NEW TRIAL.

CASES.

Abrath v. North Eastern R. W. Co., 11 Q. B. D. 79, 440, Commented on.]—See MALICIOUS PROSECUTION.

Breeze v. Midland R. W. Co., 26 Gr. 225, followed.]—See MECHANICS' LIEN, 2.

Carscallen v. Moodie, 15 U. C. R. 92, *Nolan v. Donnelly*, 4 O. R. 440, considered and followed.]—See BANKRUPTCY AND INSOLVENCY, 3.

Corporation of Township of Brock v. Toronto & Nipissing R. W. Co., 37 U. C. R. 372, followed.]—See RAILWAYS AND RAILWAY COS., 2.

Denison v. Denison, 17 Gr. 306, doubted.]—See WILL, 5.

Fleury v. Pringle, 29 Gr. 67, *Black v. Fountain*, 23 Gr. 174, followed.]—See DOWER.

Gamble v. Gummerson, 9 Gr. 199, approved.]—See SALE OF LAND, 2.

Gray v. Bell, 23 Gr. 390, followed.]—See REGISTRY LAWS.

Harris v. Mudie, 7 O. R. 414, distinguished.]—See LIMITATIONS, STATUTE OF, 2.

Jarvis v. Cooke, Re, 29 Gr. 303, considered.]—See BANKRUPTCY AND INSOLVENCY, 1.

Lord Lilford v. Powys-Keck, 30 Beav. 300, distinguished.]—See WILL, 1.

Meriden v. Lee, 2 O. R. 451, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

McDonald v. Murray, 2 O. R. 573, followed.]—See SALE OF LAND, 1.

Philips v. Homfray, 24 Ch. D., 439, discussed.]—See PATENT OF INVENTION, 1.

Quimby v. Quimby, 5 O. R., 38, followed.]—See WILL, 2.

Redmont v. Redmond, 27 U. C. R. 220 followed.]—See MASTER AND SERVANT.

Schibsby v. Westenholz, L.R. 6 Q.B., 155 followed.]—See FOREIGN JUDGMENT, 2.

CERTIORARI.

See PATENT OF INVENTION, 3—VAGRANT.

CHARITY.

See WILL, 5.

CHARTER.

See CORPORATIONS, 4.

CHATTEL MORTGAGE.

See FRAUDULENT CONVEYANCES, 1.

Void against creditors.]—See BANKRUPTCY AND INSOLVENCY, 2.

COMPANY.

See CORPORATIONS, 1, 4.

COMPENSATION.

See NEW TRIAL—MUNICIPAL CORPORATIONS, 5.

CONCEALMENT.

See CORPORATIONS, 4.

CONDITION PRECEDENT.

See SALE OF LAND, 1.

CONSTITUTIONAL LAW.

See CORPORATIONS, 4.

CONTRACT.

1. *Undue advantage*—*Inequality between the parties*—*Rescission.*]—If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the other by reason of the circumstances mentioned, a transaction resting upon such unconscionable dealing, will not be allowed to stand.

Held, therefore, in the present case, affirming the decision of OSLER, J. A.,—it appearing upon the evidence that the plaintiff being over-matched and overreached by the defendant, without information and without advice, had made a most improvident exchange of certain real and personal property of his own for certain real and personal property of the defendant—the plaintiff was entitled to have the transaction rescinded; that the plaintiff's general condition of ignorance, his want of skill in business, and his comparative imbecility of intellect,

were such as to require the Court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected. *Waters v. Donnelly*, 391.

2. *Contract in writing—Additional parol term—Parol evidence—Admissibility of.*—The defendants wrote to the plaintiffs: "We will furnish scows, and deliver all the stone required for the Omemee bridge as fast as you require them, for the sum of seventy-five cents per cubic yard." To which the defendants replied. "We accept the above offer at the price and conditions named."

Held, CAMERON, C. J., dissenting, that parol evidence was admissible to shew that the carriage was to be by lake and river navigation, and was only to take place provided the water along the route remained of a named height, sufficient to enable the defendants to use their steamers in towing the scows. *McNeely et al. v. McWilliams et al.*, 728.

Illegality of.—See GAMING—MASTER AND SERVANT—SALE OF LAND, 4.

CONTRIBUTORY NEGLIGENCE.

See MUNICIPAL CORPORATIONS, 1.

CORPORATIONS.

1. *Promissory note—Officer of company—Liability—Perfected note—Extrinsic evidence—"Per," meaning of—Election—40 Vic. ch. 43, sec. 79, D.*—Action against the defendant as the maker of a promissory note. Before the defendant's signature was,

as alleged, the word *Per*, and underneath was the name "William Stockdale, manager." The alleged note was given in renewal of a note made by the Toronto Patent Wheel and Waggon Company, limited, and was brought to the defendant by plaintiff for the purpose of having it executed by the company, when defendant, who was the secretary of the company, signed it, the intention being that the company's name should be filled in over defendants by the company's manager, by stamping it with defendant's stamp, but which was not done. After the note became due, the plaintiff proved on it against the company who had gone into insolvency, and obtained a dividend.

Held, that the defendant was not liable.

Per CAMERON, C. J.—The defendant must be treated as maker of the note, extrinsic evidence not being admissible to change its legal effect: that the word *per* as written, would not assist defendant, for it might be treated as merely a flourish to the initial letter to the defendant's name; but, even if assumed to be *per*, i. e., by, it would merely signify that the name Wm. Stockdale was written by defendant, which the evidence shewed was not the case; but that the plaintiff by proving against the company on the note and accepting a dividend thereon, had elected to look to the company, and thereby absolve the defendant.

Per OSLER, J. A.—The defendant could not be treated as maker of a note, for the evidence shewed that the instrument never was perfected as a note; and that this was no infringement of the rule as to the admission of parol evidence, for its effect was not to alter a note but to

shew that the condition upon which it was to become a note had not been performed.

Held, that the provisions of sec. 79 of 40 Vic. ch. 43, D., did not apply to this note, as it did not purport to be a note signed by or on behalf of the company. *Brown v. Howland*, 48.

2. *Foreign company doing business in Ontario—Winding-up—45 Vic. c. 23 (D.)—47 Vic. c. 39 (D.)—Ultra vires—Creditor proceeding against foreign assets—Injunction—Effect of staying proceedings at debtor's request.*—A winding-up order under 45 Vic. c. 23 (D.), winding-up a foreign company doing business in Ontario, made by one Judge, will not be set aside by another. An application for that purpose must be made to the Divisional Court.

After a winding-up order had been made, P., a resident of Ontario, brought an action against the company in the State of Michigan, with a view to attaching a steamer wintering there, which was the property of the company. It was shewn that representations that the company was perfectly solvent had been made by both the secretary and managing director to P., and P. swore that but for these representations he would have taken proceedings before he did, which might have enabled him to obtain a judgment before the winding-up order was made.

In an action for an injunction to restrain P. from proceeding with his action in Michigan, in which it was shewn that other creditors of the company, who were residents of the United States, and so not within the jurisdiction of the Court, were also proceeding against the steamer, it was

Held, that this case could not be distinguished in principle from *Ex. p. Railway Steel and Plant Co.—In re Taylor*, 8 Ch. D. 183, and the continuance of the injunction, which had been granted *ex parte*, was refused. *In re Lake Superior Native Copper Company (Limited)—Re Plummer*, 277.

3. *Directors—Consent to transfer of shares—Fraud—Breach of trust—Powers of directors—Liability.*—On an appeal from the judgment of BOYD, C., reported 6 O. R. 291.

Held, (reversing the judgment of BOYD, C.) that the defendant directors in allowing the transfers complained of were upon the evidence guilty of no fraud towards the shareholders, and that such act was within the scope of the prescribed powers and duties of directors, and as neither fraud nor a breach of trust was proved, the cross-appeal was allowed, and the action dismissed with costs. *Thompson et al. v. The Canada Fire and Marine Insurance Company et al*, 284.

4. *Company—Provisional directors—Personal liability—Concealment—Dominion Charter.*—The plaintiffs, a company incorporated under the Canada Joint Stock Companies Act of 1877, owning two steamers used as pleasure boats in navigating the River Thames, agreed through W., the principal shareholder, to sell them to a company to be formed by B. one of the defendants herein, for \$12,000, \$7,500 in cash, \$4,000 in stock of the new company, and \$500 allowed for repairs. B. procured the stock in the new company to be taken up, and a meeting of the subscribers, amongst others, the defendants, was held, when a resolution was passed appointing the defendants the first

directors of the company, and requiring half of the stock to be paid up at once, and the balance as the directors should determine, and a charter applied for. The purchase of the vessels was ratified and the defendants authorized to carry out the same, and the vessels directed to be put in repair. Subsequent meetings were held, at which the repairs were directed, and a manager appointed, and other acts done. The manager, under authority from the defendants took possession of the vessels, and after \$2,000 had been expended in repairs, one of the vessels was carried away by a flood and wrecked. W. and four other persons owned all the stock in the plaintiff company, four of whom, including W., were subscribers to the amount of \$1,000 each in the new company and promoters thereof; and it was agreed between W. and B. that B. was to get this \$4,000 of stock as compensation for his services in raising the new company, but of this the other defendants had no notice or knowledge. A charter for the new company was never obtained. The defendants stated that they never intended to incur any personal liability. The vessels were proved to be worth the 12,000. The sum of \$3,500 was paid on the purchase, and this action was to recover the balance due.

Held, that the defendants were personally liable for the amount claimed: that the fact of W. and the other shareholders of the plaintiff company being subscribers to and acting as promoters of the new company could make no difference, for it was their individual act and not that of the company; nor was the contract vitiated by the omission to communicate to the other defendants

the gift of the stock to B. as being a fraudulent concealment; for B. was under no obligation to state his compensation, nor were W. and the three others debarred from giving away their stock; and the defendants were not induced to become subscribers through B.'s subscription.

An objection that the plaintiffs' charter was *ultra vires* the Dominion Parliament was overruled, there being nothing on the face of the charter to denote that its object was within the scope of the Dominion Parliament to deal with. *The Thames Navigation Co., Limited, v. Reid et al.*, 754.

COSTS.

See MORTGAGE, 1, 2—ASSESSMENT AND TAXES, 3—SALE OF LAND, 1—MUNICIPAL CORPORATIONS, 6—RAILWAYS AND RAILWAY COMPANIES, 2—HUSBAND AND WIFE, 2.

COUNTERCLAIM.

See FRAUD AND MISREPRESENTATION, 1.

COUNTY JUDGE.

Jurisdiction of.—*See* CANADA TEMPERANCE ACT, 1878.

COURTS.

Revision.—*See* ASSESSMENT AND TAXES, 3.

Suit within competency of Division Court brought in High Court.—*See* MORTGAGE, 2.

COVENANT.

In restraint of trade.]—See RES-
TRAINT OF TRADE.

CRIMINAL LAW.

See VAGRANT.

CROWN LANDS.

See BANKS.

DAMAGES.

Mitigation of.]—See SALE OF
GOODS.

See SALE OF LAND, 1—BANK-
RUPTCY AND INSOLVENCY, 1—WORK
AND LABOUR—DEFAMATION, 2, 4.

DECEIT.

See INSURANCE — FRAUD AND
MISREPRESENTATION, 1.

DEED.

See ESTOPPEL—VOLUNTARY CON-
VEYANCE.

DEFAMATION.

1. *Libel—Publication — Evidence of—Onus of proof.*]—The plaintiff had been a servant of the defendant, and on leaving the defendant's service, asked for a statement of account, whereupon the defendant made out an account as follows: "Mr. Joseph Jackson to Wm. Staley, Dr." Amongst the items were the

following: "Stole hay during winter, \$4.00," and "stole hatchet-hammer, \$1.50." The account was placed in an unsealed envelope and handed to M., the plaintiff's then employer, who took it to the plaintiff's house and put it on the table between the plaintiff and his wife while at supper. The wife took up the envelope and taking out the account read it to the plaintiff who could neither read nor write. There was no evidence to shew that the defendant knew that the plaintiff could not read, the only knowledge that the defendant could have had being that the wife had signed plaintiff's contract with defendant; but it did not appear that the defendant's attention was called to this fact or that he knew that the signature was not the plaintiff's own hand writing; nor was there any evidence that M. read the account or took it out of the envelope, and he was not called as a witness. In an action of libel on the account, it was

Held, that there was no evidence of publication; and as the onus of proof thereof was on the plaintiff, the action failed. *Jackson v. Staley*, 334.

2. *Newspaper article commenting on previous trial—Correction of—Materiality—Malice—Pleading evidence in mitigation of damages.*]—The statement of claim, in an action of libel brought by plaintiff, an insurance inspector and adjuster, and at the time of action brought the liquidator of an insurance company, alleged that defendant in an article published in his newspaper commenting on the trial of a previous action of libel brought by plaintiff against defendant in which plaintiff had recovered one shilling damages, stated that he would not have been surprised if the jury had found more

favourably for plaintiff, for though evidence of general reputation was admitted, the Court had refused to allow evidence of specific acts of improper conduct, unless directly connected with the insurance company; and that in further commenting on said trial in his said article falsely and maliciously published of the plaintiff, in his business as an insurance adjuster, that plaintiff would have been asked to explain the purchase of a claim in respect of a loss, one half of the amount of which he afterwards received from the company while their adjuster; and as to gifts received from persons whose losses he had adjusted; the inuendo alleged being that plaintiff had been dishonest in adjusting claims and had accepted bribes, &c.; and that the article was an unfair and false report of the trial. The defendant by his statement of defence admitted the publication of the article, but denied the inuendo, and also any malice &c.; and alleged that there was an inaccuracy in the article as to the question which might have been asked plaintiff by which a wrong impression might have been conveyed which was corrected at the earliest opportunity in defendant's newspaper by an article stating that the question referred to should have been that the purchase was made in respect of a loss which occurred while the company's adjuster, but that the payment was after he had left the company.

Held, on demurrer, that the difference between the first and second articles as to the payment on the alleged purchase was material; for if it was proved that the first article was in this respect false to the knowledge of the defendant, and he made no correction, this would be evidence

of malice, and would probably materially affect the damages; but even if immaterial the plaintiff was not prejudiced: that it was only offered as a defence to a portion of the damages.

The demurrer was therefore overruled. *Livingstone v. Trout*, 483.

3. *Privileged occasion—Malice—School trustee—Ratepayer—Pleading.*—The plaintiff, a school trustee, with another trustee, under the authority of the school board, purchased a quantity of firewood for use in the school house. In December, shortly before the municipal and school trustee elections, the defendant and H., another school trustee, were discussing the taxes, when defendant said that the trustees had paid too much for the wood: that plaintiff had culled it, and sold the best of it, and had drawn the culled wood to the school house, and, on H. remonstrating with him, said: "Oh, but he did, and I can prove it": that he could prove it by a person named N. Subsequently in the same month, a discussion took place between the defendant and B., first as to council, and then as to school matters, when defendant related the conversation he had with N., in which he had said to N. that the wood was dear, and that N. had said that it was No. 2 at that; that there was something strange about the wood, and it must have been culled, for they bought No. 1, and drew No. 2 to the school house. In an action for slander,

Held, ROSE, J., dissenting, that the words having been spoken by a person interested to another, also interested, the occasion was privileged; and in the absence of proof of express malice no action would lie.

Quære, whether defamatory words spoken of a person holding an elective office with regard thereto, not followed by special damage, are actionable when they would not be so when spoken of the holder in his private capacity.

Held, also, that the omission to plead such privilege as a defence did not preclude the defendant from setting it up at the trial. *Blagden v. Bennett*. 593.

4. *Slander — Justification — Restriction to mitigation of damages—Pleading.*—To an action of slander the defendant set up as a defence facts which amounted to a justification, but restricted their effect to the mitigation of the damages.

Held, this constituted a good defence. *Wilson v. Woods*, 687.

DEMAND.

See TOLLS — ASSESSMENT AND TAXES, 4.

DEMURRER.

See WORK AND LABOUR.

DESCRIPTION OF LAND.

See ASSESSMENT OF TAXES, 4.

DIRECTORS.

See CORPORATIONS, 3.

DISTRESS.

See TOLLS — ASSESSMENT AND TAXES, 4.

DIVISION COURTS.

See INTERPLEADER—MORTGAGE, 2.

DIVISIONAL COURTS.

See CORPORATIONS, 2.

DOWER.

Alienation by husband — Dower Act of 1879—42 Vic. ch. 22 (O.)—In 1881 C. S. mortgaged certain lands to J. A., his wife M. S. joining and barring dower. In 1884 C. S. sold the lands to C., M. S. again joining in the conveyance. C. gave back a mortgage to secure payment of part of the purchase money, which mortgage was made to M. S. On a judgment creditor of C. S. seeking a declaration that M. S. held this mortgage as trustee for C. S., and and for a sale and payment thereof of his judgment debt, M. S. alleged that the mortgage was made to her in consideration of her joining in the sale to C., and thus barring her right to dower.

Held, that M. S. had no such right of dower as alleged, and that there was no consideration for the making of the mortgage to C., and that she held the same as the trustee for C. S.

Fleury v. Pringle, 29 Gr. 67, and *Black v. Fountain*, 23 Gr. 174, followed. *Smart v. Sorenson et al*, 640.

Election.—*See* WILL, 2.

DRAINS.

See MUNICIPAL CORPORATIONS, 5, 6, 7.

EJECTMENT.

See BANKRUPTCY AND INSOLVENCY, 1.

ELECTION.

See CORPORATIONS, 1.

By widows between Will and Dower.—See WILL, 2.

EQUITY OF REDEMPTION.

See DOWER.

ESTATE.

See ESTOPPEL—WILL, 6.

ESTOPPEL.

Estoppel by deed—Subsequent acquisition of estate—Necessity of recital or covenant to create estoppel—Distinction between English and Canadian law—Conveyancing—Estate—Quit claim deed—Unwilling grantee].—M. C. made a voluntary deed of certain land to L. C. At that time M. C. had no title to the land, it having been previously sold for taxes and conveyed by sheriff's deed to B. There were no recitals or covenants for title in the deed to L. C., and by it M. C. did "assign, transfer, demise, release, convey and forever quit claim" to L. C., his heirs and assigns, all his estate in the land. Subsequently B. sold and conveyed the land to M. C.

Held, that the deed from M. C. to L. C. did not operate by estoppel to vest the estate in the land subsequently acquired from B. in L. C., for

(1) there was no recital or covenant for title; (2) it did not purport to grant any estate in the land, but merely to assign or release and quit claim to L. M. C.'s interest therein; (3) it never had any operation, for L. C. never paid anything for the land, never went into possession, never claimed to be owner of it, or paid the taxes, and from the first repudiated the gift.

It is a firmly established rule of property in Ontario that covenants for title are sufficient to work an estoppel, though it is otherwise held in England. *Casselman et al. v. Casselman*, 442.

See FOREIGN JUDGMENT, 1—ASSESSMENT AND TAXES, 2.

EVIDENCE.

Trial—Evidence—Exclusion of witnesses.].—At the beginning of a trial all witnesses were ordered out of Court, except the parties to the action. Judgment having been given dismissing the action as against the defendant P., his co-defendant M. entered upon his case and called P. as a witness. P. had remained in Court and heard the whole of the evidence adduced by the plaintiff, and his evidence was rejected on this ground.

Held, that the evidence of P. was improperly rejected, and a new trial was ordered. *Mahoney v. MacDonnell et al*, 137.

Rejection of].—See MUNICIPAL CORPORATIONS, 1.

Parol admission of].—See CORPORATIONS, 1.

Field notes of Surveyor.]—See LIMITATIONS, STATUTE of, 2.

Parol.]—See FIXTURES — CONTRACT, 2.

See ARBITRATION AND AWARD—DEFAMATION, 1—FRAUDULENT CONVEYANCES, 3—INSURANCE—PRACTICE—VOLUNTARY CONVEYANCE.

EXECUTORS AND ADMINISTRATORS.

Not liable for profits of patent of invention accruing to testator before death.]—See PATENT OF INVENTION, 1.

Compensation of.]—See WILL, 5.

EXPRESS COMPANIES.

See RAILWAYS AND RAILWAY COMPANIES, 1.

FIXTURES.

The maxim *quicquid plantatur solo, solo cedit* has no weight or application when the land to which the chattels are affixed is that of a stranger, and not of the party affixing them, and in such case the wrong-doer can neither rightfully or wrongfully give to the owner of the land a title to the chattels.

The plaintiffs sold a portable saw-mill, engine, boiler, &c., to O. & K., but the property and right of possession was not to pass until payment of the price. O. & K. used the mill, &c., as a portable mill, for which they were designed, and then under the belief that they were the purchasers of certain land from the Canada Company through the com-

pany's agent, erected the mill &c., thereon, so as to assume a permanent character. It appeared, however that the agent had no power to sell, and the land was afterwards sold to the defendant. On the 12th November, 1883, prior to the defendant's purchase, the defendant took from O. & K. a mortgage on the land to secure an alleged indebtedness to him, and on the 15th November a chattel mortgage on the above chattels. The latter mortgage did not state the amount of the indebtedness, and the affidavit of *bona fides* was equally defective, as it merely stated that the mortgagors "are fully indebted to me," the mortgagee, "in a large sum of money," no sum being mentioned. On the 27th November, on the boiler being exchanged for another one, O. & K. gave plaintiffs a chattel mortgage thereon. There was a misdescription therein as to the number of flues of the boiler, and as to the land on which it was situated. The defendant having claimed the mill, &c., as against the plaintiffs,

Held, that the plaintiffs were entitled to recover damages not only for the goods owned by them, but also for the boiler under their chattel mortgage, for though it was subsequent to the defendant's the latter was void as against the plaintiffs, the amount of indebtedness existing or created by the mortgage not being mentioned therein and in the affidavit of *bona fides*, as required by the first and second sections of R. S. O. ch. 119.

Held, also, that parol evidence was admissible to shew that the boiler in question was the one mortgaged. *The Stevens, Turner and Burns Foundry and General Manufacturing Company, Limited v Samuel Barfoot*, 692.

FOREIGN CORPORATIONS.

See CORPORATIONS, 2.

FOREIGN JUDGMENT.

1. *Pleading foreign judgment—Master's office—Estoppel—Foreign judgment for alimony—Husband and wife—Expenses incurred by trustee under invalid trust deed.*]—This action as originally brought was to take the plaintiff's accounts under a postnuptial settlement, in which the plaintiff and the defendant D. J. R. were trustees, but after the hearing and before decree, a question was raised by amendment as to the liability of the defendant D. J. R., to pay certain moneys alleged to have been advanced by the plaintiff for the maintenance of his wife and children, and on the argument of this question judgment was given directing a reference as to such claim. Before the argument judgment had been rendered in the Superior Court of Quebec, on the same question in D. J. R.'s favour, and on the reference D. J. R. proved this judgment, contending that it concluded the matter, as being *res judicata*, though not pleaded.

Held, that D. J. R. had had no opportunity of pleading such judgment and that it was therefore conclusive when set up in the Master's Office without being pleaded.

Held, also, that a foreign judgment for alimony put an end to any implied liability on the husband's part to pay for his wife's maintenance subsequently to the date from which alimony was to be paid under such judgment.

Semle, that though the trust deed in question was invalid, and not withstanding *Smith v. Dresser*, L. R. 1 Eq. 651, 35 Beav. 378, yet as

against one who himself assisted in creating the trust, a trustee acting under it would have been entitled to expenses incurred in respect of it; but upon the facts stated it was held that the sums claimed were not shewn to have been incurred in respect of the trust deed. *Hughes v. Rees et al.*, 198.

2. *Judgment against non-resident and without notice—Validity of—Motion to set same aside in foreign Court—Effect of.*]—To an action on a judgment recovered in the Court of Queen's Bench, Manitoba, the defendant set up as a defence that he was not at or during the time proceedings were taken to recover the said alleged judgment, nor had he since been a resident of or domiciled within the said Province of Manitoba, and was not served with any process or notice of the said action, nor had he any opportunity of appearing in said action and defending same; and the said judgment was obtained in his absence and without his knowledge.

Held, following *Schibsky v. Wesienholz*, L. R. 6 Q. B. 155, a good defence.

The defendant, on hearing of the judgment having been entered against him, instructed counsel to move to set same aside, but the application was refused on the ground that it was too late.

Held, that this did not preclude defendant from disputing the validity of the judgment on the action thereon in this Province. *McLean v. Shields and Leacock*, 699.

FRAUD AND MISREPRESENTATION.

1. *Action on a promissory note—Counter-claim alleging fraud in ob-*

tuining note—Rescission—Action of deceit—Judgment for plaintiff on note—New trial on counter-claim—O. J. A. Rule 321.—To sustain an action for deceit actual fraud must be proved, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law fully imputes to produce those consequences which are the natural result of his acts, and it must also be established that such fraud was the inducing cause to the contract, and must have produced in the mind of the person alleged to be defrauded an erroneous belief influencing his conduct.

In an action on a promissory note the defendant counter-claimed, setting up that the note was given in part payment of the purchase money of certain land in Manitoba, which the defendant alleged that he was induced to purchase by plaintiff's false representations as to its value and location. The jury found the amount due on the note was \$1,590, but that the defendant was induced to enter into the contract to purchase the land by the plaintiff's fraudulent misrepresentations; and they assessed his damages at the above amount, and judgment was entered in defendant's favour.

Held, on the evidence, there would be no rescission of the contract, but the defendant must rely on his claim for damages for deceit; that the evidence failed to disclose actual fraud; that all events the only evidence which could be submitted to the jury was as to location; but while this was too slight to allow the verdict to stand, the Court did not feel justified in

disposing of the case themselves, though perhaps they might do so under O. J. A., Rule 321. They therefore directed a new trial on the counter-claim; but so that plaintiff's legitimate claim on the note should not be delayed in the meantime, judgment was directed to be entered in his favour thereon. *Garland v. Thompson*, 376.

2. *Misrepresentation—Action of deceit—Abatement—Death of one defendant—Parties—Locus standi.*—The plaintiffs, formerly owners of a line of steamers, brought this action against the defendants, who were formerly owners of another line of steamers, alleging that by certain misrepresentations on the part of the defendants as to certain contracts alleged by them to be held in connection with their line, they, the plaintiffs, were induced to enter into an agreement with the defendants for the amalgamation of the two lines, and the formation, in connection with the defendants, of a joint stock company to own and run the same, and seeking damages in respect of such misrepresentations. One of the defendants died after issue joined.

Held, that nevertheless the action could be proceeded with against the surviving defendants.

Held, also, that the action was rightly brought by the present plaintiffs, and not by the company. *Beatty et al. v. Neelon et al.*, 385.

See ASSESSMENT AND TAXES, 3 — CORPORATIONS, 3 — INSURANCE — SALE OF LAND, 2 — VOLUNTARY CONVEYANCE.

FRAUDULENT CONVEYANCES.

1. *Fraudulent preference—Action by secured creditor—R. S. O. ch. 118.*—H., a creditor of S., in respect of a debt for which he held security on the lands of S., sought to have a chattel mortgage made by the latter declared void as a fraudulent preference.

Held, that in the absence of proof that the security held by him was inadequate he could not succeed. *Clark v. The Hamilton Provident and Loan Society*, 177.

2. *Acquiescence by creditor—Action by a subsequent creditor becoming such by endorsing and paying a note made by the grantor prior to the impeached conveyance.*—Where one impeached a conveyance of land to M., the wife of K., on the ground that the land was really bought with K.'s money, and was so bought and conveyed to M. at K.'s direction, with the intent of delaying and hindering the plaintiff and other creditors of K., and no fraudulent intent in respect to the said conveyance was proved, and it appeared that the plaintiff was himself consulted with regard to the matter, and knowing all the circumstances of K.'s financial position expressed his approval of what was done, and it further appeared that the plaintiff was not himself a creditor of K. at the time of the impeached conveyance, but only became so subsequently by endorsing and finally paying a promissory note of K.'s representing a liability incurred by K. prior to the impeached conveyance.

Held, affirming the decision of FERGUSON, J., that under these circumstances the plaintiff could not have the deed set aside as a fraud

upon him. *Ferguson v. Ferguson, et al.*, 218.

3. *Conveyance in fraud of creditors—"Creditors"—Accrual of right of action—Locus standi—13 Eliz. ch. 5.*—The plaintiffs sought to set aside a certain conveyance, dated February 27th, 1880, and made by M. to G., as executed in fraud of themselves, as creditors. It appeared that the plaintiffs had not recovered judgment for the debt, in respect of which they claimed to be creditors, until July 23rd, 1883, and that this was a judgment recovered in an action on a covenant as to the validity of certain mortgages purchased by them from M., contained in a deed, of March 1st, 1880, by which the said mortgages were conveyed by M. to them. The plaintiffs, however, sought at the trial of this action to give evidence that this deed of March 1st, 1880, was made in pursuance of an agreement for the purchase of the said mortgages entered into by themselves with M., before January 1st, 1880, and that this agreement was induced by certain misrepresentations made by M. as to the validity of the said mortgages. It appeared, however, that the consideration of the purchasee was to be the transfer of certain shares in the capital stock of the plaintiffs' company to M., and that these shares were not actually so transferred until after February 27th, 1880, and the evidence so sought to be given was excluded.

Held, per FERGUSON, J., that the liability of M. only began at the time of the execution of the covenant in the deed of March 1st, 1880, and inasmuch as the impeached conveyance was antecedent to this, and it was not shewn that there were at the date of it any existing debts, nor that it was intended to defeat any

future debt, the plaintiffs must be nonsuited. *See* *GALE*.

Held, on appeal, per *BOYD*, C., that since the plaintiffs did not really become creditors of M. until they recovered judgment, the legal and only position of the plaintiffs was that of subsequent creditors, and as it was not pretended that the impeached conveyance was given with a view to defeat subsequent creditors, the plaintiffs had no *locus standi* to recover under 13 Eliz. ch. 5, even if the impeached conveyance was held to be of a voluntary character, as to which *quære*. It was altogether illusory to endeavour to trace back the origin of the plaintiffs' claim to the alleged misrepresentations which were not acted upon until after the impeached conveyance, and, moreover, whatever cause of action the plaintiffs then had, they did not prosecute it, or become creditors in respect of it. The judgment below was therefore right.

Per *PROUDFOOT*, J.—Though an action for damages could not be brought until the damage occurred, yet if the original agreement for the purchase of the mortgages was based on misrepresentations of M., the plaintiffs right dated from the agreement. It was not necessary for the plaintiffs to be creditors, it was sufficient for them to have a right of action. Therefore the exclusion of the evidence offered by the plaintiffs as aforesaid, and the judgment of the Court below was wrong.

Held, also, per *PROUDFOOT*, J., that on the evidence adduced, the conveyance impeached appeared to have been a voluntary one. *The Real Estate Loan Co. of Canada (Lim.) v. The Yorkville and Vaughan Road Co., et al.*, 464.

FRAUDULENT CONVEYANCES.

See *BANKRUPTCY AND INSOLVENCY*, 2—*VOLUNTARY CONVEYANCE*.

FRAUDS, STATUTE OF.

See *SALE OF LAND*, 3—*SALE OF LAND*, 4.

GAMING.

Horse racing—Illegal contract—Match made with non-owner—Stakeholder—13 Geo. II. c. 19.—*D.* and *H.* agreed to match a colt owned by *D.* against a colt owned by *S.* Under the agreement the stakes were deposited with *P.*, who, default being made by *D.*, handed over the amount of *D.*'s deposit to *H.*, although *D.* had previously demanded it back. *D.* is now bringing this action against *H.* and *P.* to recover the amount of the deposit,

Held, that the race was an illegal one under 13 Geo. II. c. 19, one of the participants not being the owner of the horse⁹ he bet upon, and therefore *D.* could not recover back from *H.* the deposit money, being himself *in pari delicto*.

Held, however, that inasmuch as *P.* should have handed back *D.*'s deposit on demand made before disposal, *D.* could now recover the amount of the same from *P.* *Davis v. Hewitt et al.*, 435.

HABEAS CORPUS.

Marginal reference to Statute.—*See* *VAGRANT*.

HIGH COURT OF JUSTICE.

See MORTGAGE, 2.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 1.

HORSERACING.

See GAMING.

HOUSE.

Owners in severalty—Removal of.]
—See INJUNCTION.

HUSBAND AND WIFE.

1. *Ante-nuptial settlement—Trusts—Executory and executed—Rule in Shelley's Case—Conveyance to husband and wife—Married Woman's Property Act, 1872—R. S. O. c. 125—R. S. O. c. 105, s. 11.]*—By ante-nuptial settlement, reciting that F. intended to make provision for his future wife, F. agreed with her and K. to transfer and convey to K. certain property he expected to acquire, to hold unto K. for the joint use and benefit of him, F., and his intended wife during their joint lives, and after the decease of either of them to the use of the survivor during his or her natural life, and after the decease of the survivor, to the use of the heirs of F. as he might by will direct; and it was further agreed that articles of settlement should be executed in pursuance of this document. After the marriage F., pursuant to the said ante-nuptial settlement, conveyed, in 1879, certain

land to K. and his heirs, upon trust, with the consent of F. and his wife, or the survivor, to sell, lease, or otherwise convey the same, and to hold the moneys thereon arising upon the trusts and subject to the powers contained in the ante-nuptial settlement. F.'s wife having died,

Held, that, though there were children of the marriage still surviving, F. was entitled to a conveyance of the lands from K. to himself in fee simple, for that the trusts of the ante-nuptial settlement were executed and not executory, and under them F. had an equitable estate in fee simple by virtue of the rule in *Shelley's Case*. *Ferris v. Ferris et al.*, 324.

2. *Wife's separate trading—Interference of husband—Injunction.]*—The plaintiff, a married woman, carried on business as an hotel-keeper, and owned the chattels in the hotel. The defendant, her husband, interfered with the plaintiff in her business by taking the receipts, giving orders to servants, and maltreating the plaintiff.

An injunction was granted restraining the defendant from interfering in the business or with the servants or agents, or removing any of the plaintiff's chattels.

Seemle, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances.

The defendant was committed for breach of the injunction, but was discharged on an application explaining and apologizing for his contempt. It appeared that he was unable to pay costs, and therefore, though costs of both motions were imposed, payment thereof was not made a

PARTNERSHIP.

1. *Death of partner—Contract of hiring.*]—*Held*, that a contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners.

The plaintiff, who sued for wrongful dismissal, having received a letter from the firm in March, 1882, dispensing with his services from the 1st January, 1883, afterwards signed a receipt for his wages for December, adding "and I am now leaving their employment." *Held*, that this was evidence for the jury of acquiescence in the termination of his engagement, more especially as he had made no claim for future wages. *Burnet v. Hope et al.*, 10.

2. *Syndicate—Right of one partner to deal with his share—Profits.*]

—M. & G. met and agreed to jointly purchase 150 acres of land and to sell it in lots, or perhaps *en bloc*, to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. M. had one-third interest and G. had two-thirds. No syndicate was got up to take the whole, and G. telegraphed M. that he was going to arrange a syndicate for two-thirds, and he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds interest, and obtained a large profit thereon. This arrangement was made in writing, and recited that G. was seised in fee of the lands, and had executed a declaration of trust of one-third in favour of M., and "executes this declaration as to the remaining two-thirds." A quit claim deed was afterwards executed by M. in favour of G., and a declaration of trust as to one-third in favour of M.,

was signed by G. In an action by M. for a share of G.'s profit, it was

Held, that there was no sale of any of the lots that belonged to M. The two-thirds had not been disposed of so as to pass out of the partnership, though as to them there might be a sub-partnership; there had been on dealing with the joint property of the partnership, but only of the individual interest of one partner; he had sold some portion of his individual share and no injury had resulted to his partner, and even if any had it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern. The action was therefore dismissed, with costs. *Mitchell v. Gormley*, 139

PART PERFORMANCE.

See SALE OF LAND, 4.

PATENT OF INVENTION.

1. *Action against executors for infringement—Saving of expense—Profits to estate—Actio personalis cum personâ moritur.*]—The plaintiff sued the executors of D. D. C. for an account of all profit accrued to the estate of D. D. C., by reason of the user by him of a certain machine made by him in alleged infringement of the plaintiff's patent, which profit consisted in the saving of expense to D. D. C.

Held, on demurrer to the statement of claim, that the plaintiff had no remedy against the executors of D. D. C. in respect of such profit accrued to him prior to his death.

Held, also, that the misrepresentation, even as urged, was immaterial, for it being as to the value of the stock at the named date, the fact of its causing an erroneous calculation upon which the amount of the loss was based would make no difference so long as it was shewn that the loss itself was within the true amount; and also the plaintiffs were estopped from setting it up, as the evidence shewed that they did not rely upon it, but on the knowledge acquired and independent information obtained by the plaintiffs' agent in the course of his investigation.

Semble, that on the evidence there was no misrepresentation at all. *The Royal Insurance Company v. Byers*, 120.

INTERPLEADER.

Division Court—Bailiff—Protection of—48 Vic. ch. 14, sec. 6, sub-sec. 3.]—By 48 Vic. ch. 14, sec. 6, sub-sec. 3, (O.,) provision is made for the Judge of the Division Court in interpleader proceedings adjudicating upon the claim, and making such order between the parties in respect thereof, &c., as to him may seem fit; and also for adjudicating between such parties, or either of them, and the bailiff, in respect of any damage or claim of or to damages arising or capable of arising out of the execution of such process by such bailiff, and making such order, &c.

Held, that the provisions of the section were for the protection of the bailiff, and were not applicable to any claim for damages as between the claimant and the execution creditors. *Fox v. Symington et al.*, 767.

JUDGMENT.

Change in.]—*See* ASSESSMENT AND TAXES, 3—FOREIGN JUDGMENT, 1, 2—AMENDMENT AT LAW—BANKS.

JURISDICTION.

See ASSESSMENT AND TAXES, 3.

JURY.

Questions for.]—*See* MALICIOUS PROSECUTION.

JUSTIFICATION.

See DEFAMATION, 4.

LACHES.

See MUNICIPAL CORPORATIONS, 4—ASSESSMENT AND TAXES, 2, 4.

LANDLORD AND TENANT.

See MECHANICS' LIEN, 1.

LAW SOCIETY.

See BARRISTERS.

LIBEL.

Proof of publication.]—*See* DEFAMATION, 1.

LIEN.

See BANKS

LIMITATIONS, STATUTE OF.

1. *Part payment — Implied promise to pay residue.*—To make a part payment take a debt out of the bar raised by the Statute of Limitations, it is sufficient if the payment be made in respect of a larger debt which is the one sued on. The payment of part is an act from which the inference may be drawn that the debtor intended to pay the balance, though no special reference is made thereto at the time of such part payment.

In an action to recover the balance of an alleged debt to which the statute was pleaded as a bar, the debt was proved, as also that several payments were made by the defendants thereon: *Held*, that an implied promise to pay the balance might be inferred, and therefore the statute did not apply. *Boulbee v. Burke*, 80.

2. *Evidence — Surveyor's field notes—Possession—Acts of occupation—Statute of Limitations—R. S. O. c. 108.*—To determine a disputed boundary line between two lots, the field notes of S., a land surveyor, were offered in evidence, but objected to on the ground that they were not made by S. in the execution of his duty as such surveyor:

Held, that the objection was good and the evidence inadmissible.

The plaintiff and M., his next adjoining neighbor, in 1868 employed a surveyor to run the line between his land and that of M. The line drawn ran through a wood. For more than ten years the plaintiff was in the habit of cutting timber up to the said land, and he and the owners of the adjoining land recognized it as the division line.

Held, that this was sufficient occupation by the plaintiff to give him a good title by possession up to the said line, whether it was the correct line or not.

Harris v. Mulie, 7 A. R. 414, distinguished. *McGregor v. Keiler et al.* 677.

See RAILWAYS AND RAILWAY COMPANIES, 2.

LIQUIDATED DAMAGES.

See WORK AND LABOR.

LOCUS STANDI.

See BANKRUPTCY AND INSOLVENCY, 2—FRAUD AND MISREPRESENTATION, 2—BANKS—FRAUDULENT CONVEYANCES, 3—AMENDMENT AT LAW.

MALICE.

See DEFAMATION, 2.

MALICIOUS PROSECUTION.

Issuing search warrant—Reasonable and probable cause—Relief—Questions for jury.—A robbery having been committed at the defendant's store a bill of an account due by the plaintiff to the defendant, which it was alleged had been rendered some time previously, was found lying near by, which from its crumpled appearance indicated that it had been carried about for some time in a person's pocket. From this the defendant said he suspected some one in the plaintiff's house, and he went to a magistrate and laid an in-

formation, upon which a search warrant was issued, and the plaintiff's house searched, but none of the stolen goods were found therein and no arrest was made. It appeared that the account which was found had never been sent to the plaintiff but a similar one had, the defendant stating that when he caused the search warrant to be issued, he was under the belief that the account had been sent, having forgotten the fact that it had not been. In an action for malicious prosecution the learned Judge entered a verdict for the defendant, holding that the plaintiff had failed to shew that the defendant acted without reasonable and probable cause.

Held, there must be a new trial; that it should have been submitted to the jury to say: 1. Whether the account was sent to the plaintiff. 2. Was it found as alleged. 3. If not sent, did the defendant believe it had been so sent. 4. If defendant did so believe, were the circumstances such as to warrant a reasonable man of ordinary prudence to form such belief; and, *per* Rose, J., it might be necessary also to submit to the jury the question, whether it was a prudent and reasonable thing for the defendant to rely on his memory.

Held, also, that an action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause.

Abrath v. North Eastern R. W. Co., 11 Q. B. D. 79, 440, commented on. *Young v. Nichol*, 347.

MANDAMUS.

See CANADA TEMPERANCE ACT, 1878.

MARKETS.

See MUNICIPAL CORPORATIONS, 3.

MARRIED WOMAN'S PROPERTY ACTS.

See HUSBAND AND WIFE, 1.

MASTER AND SERVANT.

Board and Lodging—Relatives—Implied contract to pay for—Necessity of evidence of express contract.—When brothers or sisters, or other near relatives, live together as a family, no promise arises by implication to pay for the services rendered or benefits which as between strangers would afford evidence of such a promise; and therefore in an action between relatives so living together for board, wages, or the like, an express promise must be proved by the party making the claim.

Redmond v. Redmond, 27 U. C. R. 220, followed and approved of. *Iler v. Iler*, 551.

See PARTNERSHIP.

MECHANICS' LIEN.

1. *Mechanics' lien—Tenant with right of purchase—Right of lien-holder to charge landlord's interest—Right of lien-holder as against mortgagees—R.S.O. ch. 120, secs. 2, 7.*—G. supplied bricks to W., who had leased certain land from H. with an option of purchase. The contract for the supply of the bricks was made between G. and W., and on W.'s credit, although H. was aware that they were being supplied, and that buildings were being erected on

the land. These buildings were being erected by W. under a verbal agreement to that effect between W. and H. subsequent to the lease, and by which agreement H. had agreed to lend part of the money required for the buildings to W., advancing the same as the work progressed on the security of the property. W. did not exercise his right of purchase under the lease, and G. filed his lien against both W. and H., and brought this action to establish the same against the interest of both of them.

Held, affirming the decision of Bcyd, C., that the interest of H. in the property was not charged.

It requires something more than mere knowledge of the work being done to bind the owner under R. S. O. ch. 120, sec. 2, sub-sec. 3. The privity and assent must be in pursuance of an agreement.

H. could in no sense be looked upon as a prior mortgagee, and it is only against such that R. S. O. ch. 120, sec. 7, gives priority to the lien holder. *Graham v. Williams et al.*, 458.

2. *Railway buildings — Engine house and turn table—Analogy of mechanics' lien to lien of execution creditors—R. S. O. ch. 120.*—*Held*, following *Breeze v. The Midland R. W. Co.*, 26 Gr. 225 (Proudfoot, J., dissenting), that a mechanic's lien does not attach upon an engine house and turn-table built for a railway company, and confessedly necessary for the proper working of the railway; and that such engine house and turn-table, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanic's lien.

There is nothing in the Mechanics' Lien Act to indicate that it was in-

tended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanic's lien is not analogous to a vendor's lien.

Per PROUDFOOT, J. The Mechanics' Lien Act was intended to place mechanics on a more favourable footing than other creditors, and their right ought not to be measured by what could be realized upon an execution. There seems no distinction in principle between their position and that of an unpaid vendor of land. *King et al. v. Alford et al.*, 643.

MINISTER OF AGRICULTURE.

Jurisdiction of.—See PATENT OF INVENTION, 3.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION, 1.

MORTGAGE.

Mortgagor and mortgagee—Accounting for surplus after sale under mortgage — Reasonable expenditure by mortgagee—Employment of agent to sell—Legal expenses.—The T. & L. Co., being mortgagees of land in Ontario, held a collateral mortgage on lands in Kansas. Default occurring they sold the lands in Ontario through one W., a land agent, who had acted also under a power of attorney for C., the mortgagor, who had agreed to a commission being allowed to him for selling. W. did not, how-

ever, actually sell until after C.'s death, when the T. & L. Co. paid him his commission.

Held, on action for an account brought by an execution creditor who had obtained his execution after the power of attorney had been given to W., and after the said agreement as to commission, that the commission was a proper item to allow the T. & L. Co. in their account.

After the mortgage on the Kansas lands had been executed, the mortgagees discovered that the lands comprised in it had been sold for taxes, and that there were also several executions against them, and they incurred expenses in attempting to stay the executions, and set aside the tax sales. The mortgagor, C., had approved of these proceedings being taken.

Held, that these expenses ought also to be allowed to the T. & L. Co. in their accounts, for whatever bound the mortgagor in taking the accounts bound the plaintiff to the same extent.

The T. & L. Co. further incurred expenses in prosecuting unsuccessful litigation arising out of a claim, made by them as landlords under the distress clause in their mortgage, to certain goods of C. seized by the sheriff under executions against him. C. did not sanction this litigation.

Held, that this expenditure could not be allowed to the T. & L. Co. in taking the accounts, but that as they made a certain sum by this litigation the costs up to that point should be allowed to them.

The general rule is, that a mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful proceedings at law instituted by himself, and not undertaken with the

approval of the mortgagor. *Wells v. The Trust and Loan Company of Canada*, 170.

2. *Action, form of—Mortgage suits—Suit within competency of Division Court brought in High Court—Costs.*—In selecting the form of action regard must be had not only to the interests of the plaintiff, but also to those of the defendant, and when a simple inexpensive mode of procedure is open, and a more expensive and burdensome course is adopted, it must be at the peril of costs.

The practice of bringing an action for an amount due on a mortgage within the proper competence of the Division Court in the High Court by making a claim for possession of the land, is one that must be carefully guarded; and, except in cases clearly indicating the necessity for proceedings in the High Court, no costs will be given to the plaintiff.

In this case, where the amount claimed under a mortgage was within the proper competence of the Division Court, but the suit was brought in the High Court, and there was no circumstances shewing the necessity for bringing it therein, no costs were allowed the plaintiff. *Vandewaters v. Horton*, 548.

Second mortgage of lands to bank.—See BANKS.

See MECHANICS' LIEN, 1—REGISTRY LAWS.

MUNICIPAL CORPORATIONS.

1. *Highway—Negligence—Contributory negligence—Improper rejection of evidence—Result not affected thereby—O. J. Act, Rule 311.*—A

building was being erected on a street in the village of Blenheim. It had a basement several feet deep, the joists of the first floor being about level with the side-walk. For the purpose of excavating the basement planks for the distance of twenty feet had been removed from the side walk, and the earth taken away so as to form a grade into the basement, planks being laid across the space so made. In the centre of the basement wall, where the door-way was, there was a hole made by the grade into the cellar. During the daytime a plank was laid from the planks across the sidewalk to the first floor, which it was customary to remove at night, and there was no direct evidence that it was not removed on the night in question. On the outside of the sidewalk there was a pile of stones and bricks, and the road was muddy. The plaintiff who knew of the dangerous character of the place, was at night going along the sidewalk, and while in front of the building met two persons. He then stepped to the right on to the ground next to the building, standing still till the persons had passed by, when on attempting to proceed himself, he struck against something and fell into the hole made by the grade into the cellar, and was injured.

Held, that the defendants were guilty of negligence, and that there was no evidence of contributory negligence on the plaintiff's part.

The testimony of a witness, since deceased, taken on a former trial, was rejected by the Judge at the trial herein: *Held*, that although improperly rejected, yet other evidence to the same effect having been received, it could not be said that the result would have been varied by the admission, and a new trial

was accordingly refused. *Copeland v. The Corporation of the Village of Blenheim*, 19.

2. *Accident—Negligence—Notice—Demurrer to paragraph of defence.*]

—Statement of claim claiming damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole in the sidewalk alleged to be defective, &c., through defendants' negligence. By the first paragraph of the statement of defence defendants denied the correctness of the statements contained in the statements of claim; and by the second paragraph set up that defendants had no notice or knowledge of the defect.

Held, on demurrer to the second paragraph, that the whole statement of defence must be read together; and that the second paragraph taken with the first constituted a good defence or was immaterial: that it could not embarrass the plaintiff, for if he proved actionable negligence he must prove either actual or presumptive notice. *Beasley v. The Corporation of the City of Hamilton*, 112.

3. *Market by-law—Sale of fresh fish.*—A by-law of the city of Ottawa set apart certain sections of the city, six in number, as markets or market places. Four of these sections were called meat, produce, and fish markets, though in the enumeration of the articles for the sale of which the markets were established, fish were not named.

Section 4 of Art. IV. declared that all produce, provisions, or articles of any kind brought to any of the meat, fish, and produce markets and exposed for sale, should be placed in boxes and exposed in carts or other vehicles which should be placed up-

on said markets under the direction of the market inspector. Any person refusing to comply therewith, or to remove such articles, vehicles, or boxes after selling their contents, should be subject to the penalty imposed by the by-law, and liable to expulsion from the market.

Section 1 of Art. IX. declared that no person should sell any fresh fish elsewhere than in such places as should be allotted and designated by the standing committee on markets, in any of the aforesaid markets. Sec. 1 of Art. X. declared that the vendors of any articles in respect of which a market fee might, under the Municipal Act, be imposed, might lawfully without paying market fees, offer for sale any such articles at any place within the city excepting the market places thereof. The by-law was a consolidation of previously existing by-laws passed from time to time. It appeared that many years ago certain stalls in each market were set apart as fish markets: that no application was ever made for standing room for carts or other vehicles from which to sell fish; and no provision made by the council for so bringing fresh fish to the market.

Held, that sec 5 of Art. IV., though wide enough to cover fresh fish, would appear not to have been framed with reference to it; and that reading sec. 1 of Art. IX. and sec. 1 of Art. X. together, they could be reconciled by construing them as providing that fresh fish might be sold in stalls and nowhere else in the markets, but outside of the markets no restriction should be placed on selling. *Re Borthwick and The Corporation of the City of Ottawa*, 114.

4. *Municipal Act 1883. sec. 96, sub-sec. 46—Hack stands—Quashing*

by-law — Laches.]—Where it was admitted that a by-law was within the powers of a municipal council under sub-sec. 46 of sec. 96 of the Municipal Act 1883, "for authorizing and for assigning stands for vehicles kept for hire on the public streets and places," &c., the Court refused to quash the by-law on the ground, alleged by the applicant, that the stand interfered with the view of the Falls from the hotel in question: that the manure on the stand was offensive, and the noise of the hackmen a nuisance, these being matters of municipal regulation, and the aid of the Court, if successfully invoked, being an interference with the discretion of the municipal council, and especially so as the stand in question had been there for twelve years and maintained under successive by-laws. *Colborne v. The Town of Niagara Falls*, 168.

5. *Municipal corporations—Drain—Negligent construction—Action—Compensation.*]—A drain was constructed by a municipal corporation, and by reason, as was alleged, of the negligent construction thereof it was not of sufficient capacity to carry away the water brought down it as was intended, or by reason of an obstruction negligently allowed to remain therein the water overflowed the banks of the drain and damaged the plaintiff's premises.

Held, that the plaintiff's claim for the damage sustained was not one for compensation under the arbitration clauses of the Municipal Act; but was properly the subject of an action in which the findings of the jury should be had as to whether the damage was caused by such negligent construction, &c., or by *vis major*, namely, an unusual flood. *McArthur*

v. *The Corporation of the Town of Collingwood*, 368.

6. *Drainage by-law*—46 Vic. ch. 18, sec. 588 (O.)—*Validity of by-law—Costs*—A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation is invalid. A by-law therefore defining the duties of inspectors of drains and enacting (1) That obstructions wilfully placed in drains should be removed by the parties placing them there or at their expense, without regard to whether such parties owned the lands through or between which such drains were situate. (2) That if such obstructions were removed by the council the cost should, on completion of the work, be paid by the council, instead of enacting that it should be so paid only in the event of the party chargeable with the obstruction failing to do so. (3) That if paid by the council the amount of such cost should be charged on the collector's roll against the lands of the party chargeable, instead of only against the party himself. (4) Because no appeal was provided for against such charging of such cost upon the collector's roll,—was quashed with costs. *In re Clark and the Municipality of the Township of Howard*, 576.

7. *Drainage—Injury to lands in adjoining township—Right of action—Injunction—Injury from increased velocity of water—Arbitration under Municipal Act*—46 Vic. c. 18 (O.), secs. 590, 591—Where M. brought action for an injunction against a municipal corporation for that by reason of certain drainage works constructed by them the defendants had caused an increased quantity of water to flow into a creek running

through his lands which were situate in an adjoining township, and which had consequently been flooded and damaged, partly from the access of water sent into the creek, and partly from the increased velocity imparted to the flow of water into the creek.

Held, that M. was entitled to an injunction restraining the increased flow of water into the creek, and also the increased velocity, and to a reference as to damages, and that he was not bound to proceed by way of arbitration under 46 Vic. c. 18, secs. 590, 591 (O.), but was at liberty to seek relief in the ordinary way by action.

Held, also, that the fact that the by-law under which the said drainage work was done had not been quashed, did not prevent the plaintiff from bringing this action. *Malott v. The Corporation of the Township of Mersea*, 611.

See PRINCIPAL SURETY.

NEGLIGENCE.

See MUNICIPAL CORPORATIONS, 1, 5—NEW TRIAL.

NEWSPAPERS.

Comment by on previous trial of libel.—See DEFAMATION, 2.

NEW TRIAL

Canal—Dam—Flooding land—Cause of damage—Negligence—Vis major—New trial.—The defendants were incorporated by 31 Vic. ch. 66^c O., with power to take and appropriate a slip of land 200 feet wide,

and to construct and maintain a canal from Black river to Lake St. John, and thence to Lake Couchiching, with the full use and enjoyment of the waters of said river, and the tributary streams and Lake St. John for floating or moving logs; and to execute thereon all necessary works but so as not to impair and injuriously affect the enjoyment of the present channels thereof; and to construct and keep in repair, subject to such provision, all locks, bridges, and erections necessary for said works; the price or compensation for the lands taken in case of dispute, or for any lands flooded or injuriously affected by the company's works, to be settled by arbitration. The defendants under their statutory powers erected a canal, and at the point of commencement constructed two piers extending into the river; and in the St. John creek, which flowed from Lake St. John to Black River below the canal, a dam was erected. A break occurred in the bank of Black river on the canal side beyond the piers, whereby large quantities of water from Black river flowed in the canal, and thus into Lake St. John. Owing to the formation of Black river below the junction of St. John creek therewith, the water in the creek at high water during freshets was backed up into Lake St. John and overflowed the plaintiffs and other lands at the head of the lake. The plaintiff contended that either by the break in the river bank whereby more water was brought down than usual, or by the dam preventing the water from flowing away, it remained longer than it otherwise would have done, and thus caused the damage complained of. Special questions were not submitted to the jury and there was no finding by them as to whether the cause of

damage, if any, was the dam or the break in the river bank. The jury found for the plaintiff.

Held, therefore, there must be a new trial to ascertain whether the damage, if any, was caused by such dam or by the break in the river bank; and, if by the latter, was it the result of negligence or by *vis major*?

Quære, whether there was any liability cognizable in a court of law attachable on the defendants; and whether the compensation clause applied, the plaintiff's land not having been flooded under any right so to do claimed by the company. *Clarke v. The Rama Timber Transport Company (Limited)*, 68.

See PRACTICE—FRAUD AND MISREPRESENTATION, 1.

NOTICE.

See MUNICIPAL CORPORATIONS, 2.

NUISANCE.

See MUNICIPAL CORPORATIONS, 4.

ONUS.

Of proof of publication of libel.—
See DEFAMATION, 1.

PAROL EVIDENCE.

See FIXTURES—CONTRACT, 2.

PARTIES.

See BANKRUPTCY AND INSOLVENCY, 2—FRAUD AND MISREPRESENTATION, 2—BANKS—RAILWAYS AND RAILWAY COMPANIES, 2.

PARTNERSHIP.

1. *Death of partner—Contract of hiring.*]—*Held*, that a contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners.

The plaintiff, who sued for wrongful dismissal, having received a letter from the firm in March, 1882, dispensing with his services from the 1st January, 1883, afterwards signed a receipt for his wages for December, adding "and I am now leaving their employment." *Held*, that this was evidence for the jury of acquiescence in the termination of his engagement, more especially as he had made no claim for future wages. *Burnet v. Hope et al.*, 10.

2. *Syndicate—Right of one partner to deal with his share—Profits.*]

—*M. & G.* met and agreed to jointly purchase 150 acres of land and to sell it in lots, or perhaps *en bloc*, to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. *M.* had one-third interest and *G.* had two-thirds. No syndicate was got up to take the whole, and *G.* telegraphed *M.* that he was going to arrange a syndicate for two-thirds, and he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds interest, and obtained a large profit thereon. This arrangement was made in writing, and recited that *G.* was seised in fee of the lands, and had executed a declaration of trust of one-third in favour of *M.*, and "executes this declaration as to the remaining two-thirds." A quit claim deed was afterwards executed by *M.* in favour of *G.*, and a declaration of trust as to one-third in favour of *M.*,

was signed by *G.* In an action by *M.* for a share of *G.*'s profit, it was

Held, that there was no sale of any of the lots that belonged to *M.* The two-thirds had not been disposed of so as to pass out of the partnership, though as to them there might be a sub-partnership; there had been on dealing with the joint property of the partnership, but only of the individual interest of one partner; he had sold some portion of his individual share and no injury had resulted to his partner, and even if any had it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern. The action was therefore dismissed, with costs. *Mitchell v. Gormley*, 139

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PATENT OF INVENTION.

1. *Action against executors for infringement—Saving of expense—Profits to estate—Actio personalis cum personâ moritur.*]—The plaintiff sued the executors of *D. D. C.* for an account of all profit accrued to the estate of *D. D. C.*, by reason of the user by him of a certain machine made by him in alleged infringement of the plaintiff's patent, which profit consisted in the saving of expense to *D. D. C.*

Held, on demurrer to the statement of claim, that the plaintiff had no remedy against the executors of *D. D. C.* in respect of such profit accrued to him prior to his death.

Philips v. Homfray, 24 Ch. D. 439, discussed and regarded as decisive in the present case.

Semble, that if the statement of claim could be read to mean that by reason of the wrongful act complained of property of a tangible character passed from the plaintiff's estate to that of D. D. C., as distinct from the saving of expense, the conclusion might be different. *Leslie v. Calvin et al.*, 207.

2. *Substitution of one method and material for another—Mechanical equivalent.*—F., being the patentee of an article known as "Florsheim's Gore," part of the description of which was "in an elastic gore, gusset, or section * * the springs arranged in groups and made of a continuous length of coiled wire," and his licensees brought an action against the defendants who were manufacturing a similar gore, the only variation being that, instead of continuing the coiled spring from group to group of the spring, they severed the wire and connected the groups of springs with a cord.

Held, merely an attempt to evade the patent, and that it was an infringement.

Held, however, that the substitution of coiled wire springs for India-rubber springs as previously used, was a mere mechanical equivalent for the India-rubber, and that it did not possess any elements of invention, and so could not be the subject of a patent. *Ball et al. v. The Crompton Corset Co. et al.* 228.

3. *Minister of Agriculture—Jurisdiction—Disputes as to patent becoming void—Functions, ministerial or judicial—Attorney General.*—On a motion for a writ of *certiorari* to

bring up into this Court all the proceedings, &c., before the Minister of Agriculture, including his decision therein, on an application made before him to have a patent declared void for non-compliance with the provisions of sec. 28 of the Patent Act of 1872,

Held, that the Minister of Agriculture, or his deputy, had jurisdiction under sec. 28 to decide any dispute as to whether a patent had become void for non-observance or violation of the provisions of that section.

Semble, that the Minister's duties are ministerial, and therefore cannot be reversed or reviewed in a Court of law; but, even if judicial, this Court cannot interfere on the ground of a total want of jurisdiction on the Minister's part to make the inquiry; for, so far at least as this Court was concerned, this must be considered *res judicata* by the decisions of *Smith v. Goldie*, 9 S. C. R. 46, and *Re Bell Telephone Co. and Minister of Agriculture*, 7 O. R. 605; nor was there a partial want of jurisdiction, by reason of the neglect of the Minister to examine witnesses on oath or his refusal to issue summonses for witnesses to attend before him, because under sec. 28 this was not required; and

Quære, whether also, if judicial, the Provincial Courts have jurisdiction to interfere with such a tribunal, it being, on 'his assumption, a Dominion Court.

Semble, that on an application to question a patent under the Statute the invention of the Attorney-General is not essential.

A writ of *certiorari* was therefore refused. *In the matter of the Bell Telephone Company*, 339.

PAYMENT.

See LIMITATIONS, STATUTE OF, 1.

PENALTY.

See WORK AND LABOUR.

PLANS.

R. S. O. ch. 111, sec. 84—Amending plan by person not an "assign"—Prohibition to County Court Judge.]—W. C., being the owner of certain land, conveyed away his interest in it to F. & Co., in March 1836. In August 1836 a plan of the town, including this property, was prepared, apparently at his instance, and was registered by his executors in January, 1850. R. K. C. became the owner in 1857, through a conveyance from F. & Co., and applied to the County Court Judge to amend the plan under R. S. O. ch. 111, sec. 84, by closing a street. On an application to restrain the County Court Judge from proceeding with the application it was

Held, that R. K. C. was not an "assign" of the person making the plan within the meaning of the statute, for F. & Co., through whom they claimed, acquired title before the plan, and a prohibition was granted. *In re the Corporation of the Town of Oakville, and Robert Kerr Chisholm, and Water Street, and the Judge of the County Court of the County of Halton*, 274.

PLEDGE.

Of timber limits.]—See BANKS.

PLEADING.

See TOLLS—FOREIGN JUDGMENT, 1, 2—REFLEVIN—DEFAMATION, 2, 3, 4—BILLS OF EXCHANGE AND PROMISSORY NOTES—DEFAMATION, 4.

POSSESSION.

See BANKRUPTCY AND INSOLVENCY, 1—SALE OF LAND, 4—LIMITATIONS, STATUTE OF, 2.

PRACTICE.

Seduction—Assessment of damages by judge without jury—Service of writ of summons—Evidence of—New trial.]—In an action of seduction no appearance was entered, the plaintiff then filed a statement of claim to which no defence was made, and interlocutory judgment was signed, and notice of assessment of damages given. The defendant did not appear at the trial and a jury was called who disagreed as to the amount of damages, and were discharged. The learned Judge then tried the case himself without a jury, upon a fresh taking of evidence, and assessed the damages, and gave judgment for the plaintiff.

Semble, that under the O. J. Act and former practice, the learned Judge in such an action had no power to dispense with the jury.

Quere, whether, in any event, a jury having been called and disagreed, they could be dispensed with, and a retrial had without a new notice; but it was unnecessary to decide the point, as it was not satisfactorily established that the writ of summons had been served on the defendant; and he was therefore allowed to have

a trial on the merits. *Adair v. Wade*, 15.

Change in Judgment.—See ASSESSMENT AND TAXES, 3.

See EVIDENCE.

PREFERENCE.

Chattel mortgage set aside as a fraudulent preference—See BANKRUPTCY AND INSOLVENCY, 2.

PRESSURE.

To give chattel mortgage.—See BANKRUPTCY AND INSOLVENCY, 2.

PRINCIPAL AND AGENT.

See MORTGAGE, 1 — SALE OF LAND, 3.

PRIORITY.

See REGISTRY LAWS.

PROCEDURE.

See ASSESSMENT AND TAXES, 2.

PRINCIPAL AND SURETY.

Municipal treasurer—Annual re-appointment—Misconduct—Condoning misconduct—Release of sureties.]

—A treasurer was appointed by the plaintiffs under R. S. O., ch. 174, by sec. 274 of which all officers appointed by a council shall hold office until removed by such council. He furnished a bond, dated the 1st of

November, 1880, conditioned that if he should "well and truly discharge the duties of township treasurer so long as he shall remain in the said office, and shall render true and just accounts of all moneys, &c., as shall come and have come into his hands during his continuance in said office, and hand the same promptly into the hands of his successor in office, then, &c." He was re-appointed annually for several years.

Held, the re-appointments were not equivalent to removals and re-appointments, but were rather a retention in office of the same treasurer, and that the sureties were not in consequence thereof discharged.

To determine a man's office as treasurer under the statute there should be some positive act of removal by which he is displaced and another appointed, or by which the office, though continued in the same person, becomes different in some material point. Mere implication arising from formal re-appointment should not be deemed equivalent to such act of removal.

The treasurer having failed to account for large sums, the council of the plaintiffs caused a letter to be written to him on the 27th of February, 1882, requiring him to settle all claims by a certain day, otherwise a special meeting would be called to consider his case. He failed to settle, and the council did not carry out their threat. In 1883 the council again becoming dissatisfied with the treasurer, passed a resolution that no further payment should be made to him, but that all moneys should be paid into a certain bank. In 1884 the council for that year rescinded this resolution and permitted the treasurer to receive the accumulated funds. No notice of any kind was given to the sureties.

Held, that the plaintiffs had failed to perform their duty by retaining the treasurer in office after they had become aware of his defalcations and continued default; and that their failure to do so was a breach of duty towards the sureties, which released the latter from all liability after the 27th of February, 1882. A reference was granted at the plaintiff's election to take an account of the amount due under the bond to that date, and in default of such election the action was dismissed, with costs. *The Corporation of the Municipality of the Township of Adjala v. McElroy et al.*, 580.

PRIVILEGED COMMUNICATION.

See DEFAMATION, 3.

PROHIBITION.

See PLANS.

PROVINCIAL COURTS.

Jurisdiction of.—*See* PATENT OF INVENTION, 3.

PUBLICATION.

Proof of.—*See* DEFAMATION, 1.

RAILWAYS AND RAILWAY COMPANIES.

dated Railway Act, 1879
—*Express companies*—*Reasonableness of rates*—*Facilities*—*Employment of station agents as agents of express company*—*Preference of one*

express company over another.—In an action by an express company against a railway company and another express company to whom certain privileges were granted by the railway company which were withheld from the plaintiffs, the principal one being that of employing the railway station agents to act as agents of the defendant express company, and in which it was also claimed that the rates charged by the railway company to the plaintiffs were unreasonable.

Held, that even if the Court had jurisdiction to inquire into the reasonableness of the rates, which was doubtful, no collusion being shewn between the defendant companies, it would not on the record and evidence in this case do so.

Held, also, that the employment of the station agents of a railway company to act as agents of express companies, with the privileges they had at the stations, is a "facility" within the meaning of the Consolidated Railway Act of 1879, 42 Vic. c. 9, s. 60, sub-s. 3 (D.), and that when such privilege is granted to one express company and refused to another, whether by contract or obligatory arrangement or not, it is an illegal bargain in contravention of the third sub section of the Act. *The Vickers Express Co. v. The Canadian Pacific R.W. Co. et al.*, 251.

2. *Six months limitation*—*R.S.O. ch. 165, sec. 34*—*Plaintiff abandoning action*—*Costs of third party.*—*Held*, that sec. 34 of R.S.O. ch. 165, which fixes a limitation of six months for bringing actions for any damage or injury sustained by reason of any railway, did not apply to an action brought against a railway company for damages for wrongfully taking

earth from off the plaintiffs' land. *The Corporation of the Township of Brock v. The Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372, followed.

Where the plaintiffs brought action against the defendants to recover possession of certain lands, and the latter resisted the claim, and also served a third party notice upon H. claiming indemnity; and, thereupon, by order in Chambers, on the application of the defendants, H. was made a party defendant to the action, and the plaintiffs afterwards abandoned their claim to the lands,

Held, that the plaintiffs must pay H.'s costs. *Beard et al. v. Credit Valley R. W. Co.*, 616.

Mechanics' lien does not attach upon engine-house and turntable of Railway Co.—See **MECHANICS' LIEN**, 2.

RECOGNIZANCE.

See **BAIL**.

REGISTRY LAWS.

Registered title—Equitable charge—Several mortgages—Priority.—W. and his son, W. W., mortgaged separate parcels of land owned in severalty to the defendant company for \$4000, with a proviso for releasing W. W.'s land on payment of \$500, and the other parcels on payment of sums named. The covenant for payment was joint. W. W. afterwards sold his land to J. W., subject to the payment of the \$500 to the company. W. then mortgaged his land to the plaintiff by an instrument which declared it subject

to the company's mortgage, and the manner in which the \$4000 was distributed upon the lands. The various conveyances were registered. It was proved that W. W. was merely a surety for his father in the mortgage transaction with the company, but the plaintiff had no notice of this

Held, (reversing the judgment of Proudfoot, J.,) that the plaintiff's registered title prevailed over the equity of W. W. to charge his father's lands with the \$500 for which he (W. W.) had made his land liable, and the land of the son was charged in favour of the plaintiff with the \$500 and interest.

Gray v. Bell, 23 Gr. 390, approved and followed. *Core v. The Ontario Loan and Debenture Company et al.*, 236.

REPLEVIN.

Pleading.—In an action of replevin the first count charged the defendant with taking certain goods on premises known as the "Creemore Woollen Mills;" and in the second count with taking certain goods on the premises known as the "Northern and North-Western Station at the said village of Creemore." The defendant pleaded denying the taking and the property, and then for a third plea set up, that one W. was tenant to the defendant of certain premises in the said village known as "Block B," and certain other premises known as the "Langtry Block;" that rent was in arrear, and because of such arrears of rent the defendant "well avowed the taking of the said goods on the said premises and justly, &c., as a distress for said rent, which still remains due and unpaid."

Held, on demurrer plea bad; for if the "said premises" upon which the alleged taking was made were the premises set out in the plea, then the taking was on other premises than those named in the declaration, and there was no confession; and the plea of *non cepit* covered this defence; but if the premises named in the declaration were referred to, then defendant confessed the taking and justified for rent due for other premises, which amounted to a taking off the demised premises, so that enough was not shewn. *Robins v. Coffee*, 332.

RESCISSION.

See FRAUD AND MISREPRESENTATION, 1—CONTRACT, 1.

RESTRAINT OF TRADE.

Convenant in restraint of trade—Inadequacy of consideration—Invalidity—Policy of the law.]—D., on entering the employment of W. as agent in the vending of teas and coffees, covenanted with W. not to engage in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as agent for any other person for at least two years after leaving W.'s employ. W. now moved for an injunction to restrain D., who had left her employ, from violating the above covenant.

Held, that the covenant was binding upon D., notwithstanding that the consideration for it might have been inadequate.

Held, also, that the above covenant was not invalid on grounds of public policy.

A covenant in restraint of trade is not invalid unless the restraint is

larger and wider than the protection of the covenantee can possibly require. *Wicher v. Darling*, 311.

REVISION, COURT OF.

See ASSESSMENT AND TAXES, 3.

RIGHT OF ACTION.

See FRAUDULENT CONVEYANCES, 3.
—MUNICIPAL CORPORATIONS, 7.

ROAD COMPANY.

See WAY.

SALE OF GOODS.

Place of inspection—Acceptance of part—Delivery by car loads—Right to reject residue as not answering contract—Mitigation of damages—Cross-action.]—The plaintiff, a lumber dealer and mill owner, agreed with the defendant, who carried on a lumber business at Hamilton, to supply him with certain grades of lumber, to be shipped on board of cars at the station nearest to the plaintiff's mills, and be sent to the defendant at Hamilton; payment to be made by acceptance at three months from delivery. The lumber was shipped in car loads to the defendant from time to time, some of which were accepted and others rejected by him.

Held, that the defendant had the right of inspection at Hamilton, but having accepted certain of the car loads, he had no right to reject the others, because composed of lumber part of which did not answer the contract, unless such part was so inferior in quality and to such an

amount as to destroy the distinctive character of the loads, which was not the case here, for out of the whole quantity delivered only four-and-a-half per cent was agreed to be defective; and that defendant must rely upon his action for damages, or give the inferiority in answer *pro tanto* to the claim. *Dyment v. Thompson*, 566.

See FIXTURES.

SALE OF LAND.

1. *Title—Purchase money—Condition precedent—Costs—Damages.*—On May 2nd, 1882, the plaintiff by agreement under seal sold certain land to defendant for \$856, \$156 to be paid on the execution of the agreement and the balance without interest on 1st January, 1883, the defendant covenanting to pay accordingly; and in consideration thereof the plaintiff covenanted to convey or cause the land to be conveyed in fee simple to defendant free from incumbrances, and to permit defendant to occupy same until default. By the agreement defendant also might assume possession, and might collect the rent then due from M., the tenant of the premises, and make arrangements with him for giving up possession. Defendant took possession, but was turned out by M., who claimed the land, and registered a *lis pendens* against it. Defendant in April, 1883, recovered judgment in ejectment against M., when M.'s solicitors undertook to, and on 17th October, 1883, did, remove the *lis pendens*. In an action brought by plaintiff on October 12th, 1883, for the recovery of the purchase money.

Held, per CAMERON, C. J., follow-

ing *McDonald v. Murray*, 2 O. R. 573, that shewing a good title was not a condition precedent to the recovery of the purchase money; and moreover the plaintiff's covenant was to convey or cause to be conveyed.

Per ROSE, J., that apart from *McDonald v. Murray*, the plaintiff was entitled to recover, for as the judgment in the ejectment action disposed of defendant's claim to the land, the existence of the *lis pendens*, which could be removed for \$5 or \$10, was no answer to the plaintiff's claim.

The defendant also counter-claimed, setting up an agreement by plaintiff to pay the ejectment costs, and also claiming damages for being kept out of possession.

Held, that to entitle the defendants to recover these costs an unqualified promise to pay should be shewn, which the evidence failed to do; but as plaintiff admitted he intended to pay a portion of them he was charged with half; and he was disallowed interest for the time defendant was kept out of possession. *McCrae v. Backer*, 1.

2. *Purchase by instalments—Outstanding incumbrance—Misrepresentation—Specific performance—Rights of purchaser.*—Cain agreed to sell lands to Carter for \$1,400 payable in yearly instalments of \$1,000 each, with interest, and covenanted that on payment he would convey to Carter in fee simple, free from incumbrances. There was, at the time of this agreement, a mortgage on the property still in force, payable some years before the last instalment of purchase money. C. & C., to whom Cain had assigned the agreement, now sued Carter for certain instalments overdue.

Held [reversing the decision of **PROUDFOOT, J.**], that C. & C. were bound to ensure the defendant, in making the intermediate payments, that he, the defendant, would have a good title, clear of incumbrances, when the period of completion of the contract had arrived.

When the price is payable by instalments, the purchaser of land has a right to have a reference as to title, and to have title manifested before he makes a single payment.

Held, further, as to the alleged misrepresentation, that it was not such as would avail the contract, but it would cast it upon the vendor to make good his representation before he could compel the payment of the purchase money. But, in any event, a purchaser of land has a right to assume that the title is good, and that it is free from incumbrance, and to require this to be shewn before he can be compelled to pay any part of his purchase money.

Gamble v. Gummerson, 8 Gr. 199, approved of. *Cameron et al. v. Carter et al.*, 426.

3. *Evidence of agency—Acquisition of legal estate by agent—Statute of Frauds.*]—D. agreed to purchase certain lands as agent for K., and accordingly executed an agreement for the purchase of the same in her own name.

Held, that the evidence of D.'s agency was receivable though not in writing, and that no subsequent dealing of D., as by acquiring the legal estate, could operate to the disadvantage of K.

Quære, whether *Bartlett v. Pickersgill*, 1 Cox. 15, 4 East 577, n. is still to be regarded as good law. *Kitchen v. Dolan*, 432.

4. *Contract of sale—Statute of*

Frauds—Purchase by tenant—Change in character of possession as evidence of part performance—Evidence of such change—Part payment of purchase money—Parol contract.]

—Where a person came into possession of real estate as tenant, and it was shown unequivocally, viz., by part payment of the purchase money evidenced by the receipt in terms therefor, that his tenancy was afterwards relinquished, and that his possession, being changed in character by parol contract to purchase, was continued as that of a vendee,

Held, that the possession thus changed was such part performance as took the contract for sale out of the Statute of Frauds. *Mages v. Kane*, 475.

See ASSESSMENT AND TAXES, 1, 2—ESTOPPEL.

SALE FOR TAXES.

See ASSESSMENT AND TAXES, 1.

SCRUTINY.

See CANADA TEMPERANCE ACT, 1878.

SEARCH WARRANT.

See MALICIOUS PROSECUTION.

SERVICE.

Of writ of summons.]—*See* PRACTICE.

SESSIONS.

See VAGRANT.

SETTLEMENT.

Antenuptial.]—See HUSBAND AND WIFE, 1.

SHARES.

Transfer of]—See CORPORATIONS, 3.

SHELLEY'S CASE.

Rule in.]—See HUSBAND AND WIFE, 1.

SLANDER.

See DEFAMATION, 3, 4.

SPECIFIC PERFORMANCE.

See SALE OF LAND, 2.

STAKEHOLDER.

See GAMING.

STATUTES, CONSTRUCTION OF.

13 *Geo. II. ch. 19.*]—See GAMING.

R. S. O. ch. 50, sec. 289.]—See ARBITRATION AND AWARD.

R. S. O. ch. 70.]—See VAGRANT.

R. S. O. ch. 105, sec. 11.]—See HUSBAND AND WIFE, 1.

R. S. O. ch. 108.]—See LIMITATIONS, STATUTE OF, 2.

R. S. O. ch. 111, sec. 84.]—See PLANS.

R. S. O. ch. 118.]—See FRAUDULENT CONVEYANCES, 1.

R. S. O. ch. 119, sec. 23.]—See BANKRUPTCY AND INSOLVENCY, 3.

R. S. O. ch. 120, secs. 2, 7.]—See MECHANICS' LIEN, 1, 2.

R. S. O. ch. 125.]—See HUSBAND AND WIFE, 1.

R. S. O. ch. 152, sec. 131.]—See TOLLS.

R. S. O. ch. 165, sec. 34.]—See RAILWAYS AND RAILWAY COMPANIES, 2.

R. S. O. ch. 180, secs. 12, 21, 57, 100, 111, 155, 156.]—See ASSESSMENT AND TAXES, 1, 2, 4.

32-33 *Vic. ch. 28, D.*]—See VAGRANT.

34 *Vic. ch. 5, secs. 40, 41, D.*]—See BANKS.

40 *Vic. ch. 43, sec. 79, D.*]—See CORPORATIONS, 1.

41 *Vic. ch. 16, secs. 61, 62, 63, O.*]—See CANADA TEMPERANCE ACT, 1878.

42 *Vic. ch. 9, sec. 60, sub-sec. 3, D.*]—See RAILWAYS AND RAILWAY COMPANIES, 1.

42 *Vic. ch. 22, O.*]—See DOWER.

43 *Vic. ch. 22.*]—See BILLS OF LADING AND WAREHOUSE RECEIPTS.

45 *Vic. ch. 23, D.*]—See CORPORATIONS, 2.

46 *Vic. ch. 18, sec. 588, 590, 591, O.*]—See MUNICIPAL CORPORATIONS, 6, 7.

47 *Vic. ch. 39, D.*]—See CORPORATIONS, 2.

48 *Vic. ch. 14, sec. 6, sub-sec. 3.*]—See INTERPLEADER.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF, 1.

STRANGER.

To proceedings.]—See BANKRUPTCY AND INSOLVENCY, 1—AMENDMENT AT LAW.

SURETY.

See PRINCIPAL AND SURETY.

SURVEY.

Field notes inadmissible in evidence.]—See LIMITATIONS, STATUTE OF, 2.

SYNDICATE.

See PARTNERSHIP, 2.

TAXES.

See ASSESSMENT AND TAXES, 1, 2, 3, 4.

THIRD PARTY.

Costs of.]—See RAILWAYS AND RAILWAY COMPANIES, 2.

TITLE.

To land.]—See SALE OF LAND, 1, 2—ESTOPPEL.

TOLLS.

Refusal to pay—Demand—Distress—R. S. O. ch. 152, sec. 131—Pleadings.]—*Held*, on demurrer to the statement of defence herein, omitting the allegation of demand and refusal of the toll at the gate, under R. S. O. ch. 152, sec. 131, and a seizure immediately following thereon, that the demand should have been at the gate, and the seizure should have followed immediately thereupon; and that the statement

of defence was therefore bad. *Enrick et al. v. Township of Yarmouth*, 162.

See WATER AND WATERCOURSES—WAY.

TRIAL.

See PRACTICE—EVIDENCE.

TRUSTS AND TRUSTEES.

Expenses of.]—See FOREIGN JUDGMENT, 1—CORPORATIONS, 3—HUSBAND AND WIFE, 1.

ULTRA VIRES.

See CORPORATIONS, 2, 4,—WAY.

VAGRANT.

Vagrant Act—Construction of—Crime—Warrant of commitment—Appeal to Sessions—Subsequent warrant of convicting magistrate—R. S. O. ch. 70—Jurisdiction under—Habeas corpus—Certiorari—Marking writ in margin—Effect of.]—The Vagrant Act, 32-33 Vic. ch. 28, D., declares certain persons or classes of persons to be vagrants, amongst others, "all common prostitutes or night walkers wandering in the fields, public streets, or high-ways, lanes, or places of public meeting, or gatherings of people, not giving a satisfactory account of themselves, all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves;" and "shall

upon conviction be deemed guilty of a misdemeanour, and punishable," &c.

Held, that the Act does not, on its true construction, declare that being a prostitute, &c., makes such persons liable to punishment as such; but only those who when found at the places mentioned, under circumstances suggesting impropriety of purpose, on request or demand are unable to give a satisfactory account of themselves.

On the conviction of the prisoner herein she was committed to custody under a warrant issued by the convicting magistrate. She gave bail and was discharged from custody under 33 Vic. ch. 27, sec. 1. On the appeal being heard, the prisoner was found guilty and the conviction affirmed, and the prisoner directed to be punished according to the conviction. No process was issued by the Sessions for enforcing the judgment of the Court, but a new warrant was issued by the convicting magistrate under which the prisoner was retaken. Writs of *habeas corpus* and *certiorari* were issued, and on the return thereof a motion was made for the discharge of the prisoner. In the margin of the writ of *habeas corpus*, it was marked "per" 33 Car. 2, which was signed by the Judge issuing it.

Held, that the prisoner was not in custody or confined under the judgment of the Sessions, but under the warrant of the convicting magistrate; and, *Semble*, under the circumstances, the convicting magistrate was *functus officio*, and therefore could not issue the warrant in question, which should have been issued by the Sessions; and possibly they could have directed punishment for the unexpired term; but that if no bail had been given,

and the prisoner had remained in custody, no further order of commitment would have been necessary, or if no warrant of commitment had been issued prior to appeal, the magistrate could have issued one thereafter.

Held, also, there was power to act under R. S. O, ch. 70, and so a Judge in Chambers could deal with the motion; that marking the writ as under the statute of Charles, did not prevent the learned Judge so acting under ch. 70, or at common law; and as no offence was declared the prisoner was directed to be discharged on the *habeas corpus*.

Held, also that under a *certiorari* the conviction might be quashed; and, as the judgment of the Sessions confirmed the conviction, it would probably fall with it. *Regina v. Arscott*, 541.

USE AND OCCUPATION.

See WATER AND WATERCOURSES.

VOLUNTARY CONVEYANCE.

Fraud—Intent to delay creditors—Evidence of—Subsequent creditor.—In 1878 J. D., carrying on business as a wool merchant, arranged with his two sons H. C. and T. D., to convey to H. D. two parcels of land which H. D. was to hold until T. D. came of age. H. D. held the land until 1882, when he conveyed it to his father, who immediately reconveyed one parcel to H. D., and the other to T. D. It was found that the conveyances of 1882 were merely to carry out the trust upon which the conveyance of 1878 was made: that when it was made J. D. was in

a position to pay all his debts in full, even after deducting the property in question; and that no debt in existence when the conveyance of 1878 was made now unpaid, except a sum of \$1,000 due to the wife for rent, which was secured by mortgage, but it appeared she joined in the conveyance, and therefore it was not available to the plaintiffs for the purpose of setting the conveyance aside.

Held, that the conveyances to H. D. and T. D. were valid, for that under the circumstances they could not be deemed to be made with intent to hinder, delay, or defraud creditors. *The Bank of Montreal v. Davis et al.*, 556.

See FRAUDULENT CONVEYANCES, 3.

VOTERS LISTS.

See CANADA TEMPERANCE ACT, 1878.

WATER AND WATER-COURSES.

Wharf—Use and occupation—Tolls—Obstruction of navigable waters.—D., by permission of the Commissioner of Crown Land Lands for Ontario, built a wharf on the waters of Toronto Bay at the island near Hanlan's Point, and claimed a sum of money from C. for the use and occupation by him of the wharf in landing passengers from his steamer.

Held, that there could be no recovery; for the evidence failed to shew any agreement by C. to pay wharfage, &c., or that tolls had been usually collected or charged, while

the relationship and dealing of the parties would raise the inference that no charge was contemplated.

Held, also, that the wharf being constructed over the navigable waters of the bay, the license of the commissioner, even if he had power to grant it, would not confer the right to impose tolls on vessels landing passengers on the wharf, for the public had a right to reach the shore over the waters of the bay, and C. having been invited, as it appeared, by the proprietors of Hanlan's point to run his vessel there, he had a right to land on the wharf which prevented his reaching the island at that place.

Quære, whether the soil at the bottom of the Toronto Bay at the place in question was vested in the province, or in the city of Toronto under the patent from the Crown of the island. *Clendinning v. Turner*, 34.

See NEW TRIAL.

WAY.

Road company—Power to exempt from payment of tolls—Ultra vires—Bridge—Location of road—Lapse of time.—By agreement made in the year 1869, between a road company and the city of Hamilton, the Road Company were to extend their road from a point near the Desjardins Canal into the limits of the city, and as part of such road should build a bridge over the canal, the city to lend the road company \$5,000 for ten years at the nominal rate of interest of one per cent., and a by-law was passed by the city to give effect to the agreement, the by-law containing a proviso that no toll should be exacted from any parties residing upon

or owning property within the limits of the city or passing over said bridge. The road was subsequently extended into Hamilton, and a toll gate erected within the city limits. Litigation afterwards arose between the road company and the city, the Great Western Railway Company, and the Desjardins Canal Company, as to the erection of the bridge, which was continued until 1874, when a settlement was effected by its being agreed by all parties that a fixed stationary bridge should be erected and maintained by the road company free from any toll thereon, which was legalized by 37 Vic. ch. 73. (O). The defendant passing through the said toll-gate refused to pay toll, on the ground that the by-law was *ultra vires*.

Held, that the proviso in the by-law was not *ultra vires*, for the road company could agree not to exact tolls from any person or body of persons, as there was nothing in the Act of incorporation which prevented their doing so: that the city of Hamilton had paid a substantial sum for the privilege, and there was no discrimination as regarded the residents thereof; and that the proviso only applied to the non-exaction of tolls on the bridge, and had nothing to do with the road, and was legalized by the 37 Vic. ch. 73, (O).

Held, also, that an objection that the location of the road had not been made prior to the passing of the by-law was not tenable after the road had been located and in use for more than fifteen years. *The Hamilton and Flamorough Road Company v. Binkley*, 621.

WHARF.

See WATER AND WATERCOURSES.

WIFE.

See HUSBAND AND WIFE, 2.

WILL.

1. *Construction—Speaking from death—Contrary intention—After-acquired property—R. S. O. ch. 106, sec. 26.*—A testator by his will, dated May 19th, 1873, devised to R. M., the "property on H. street," and proceeded: "I give all the rest and residue of my estate real, personal, and mixed, which I shall be entitled to at the time of my decease, to R. M." At the date of the will he possessed only one part on H. street, known as the Red Lion Hotel, but he subsequently acquired other property on that street.

Held, that, notwithstanding R. S. O. ch. 106, sec. 26, the after-acquired property on H. street did not go to R. M., but fell into the residue.

The testator having expressed his intention with reference to all land acquired by him after the date of his will by appropriate words in that will, it would be going contrary to that intention to declare that some after-acquired property should be withdrawn from the residuary claim and held to pass under the prior specific devise.

Lord Lilford v. Powys Keck, 30 Beav. 300, distinguished. *Morrison v. Morrison et al.* 223.

2. *Construction—Widow's election—Implied intention to exclude dower.*—A testator by his will left all his real and personal property to J. K., "subject to the following bequest, viz: to my wife E. K. a one-third interest in all my real and personal estate, so long as she shall remain unmarried."

Held, that E. K. was bound to elect between the will and her dower, for the former imported that there was to be the same manner of division of the land as of the personalty, viz: a division of the entire property of each kind, which would be defeated, if dower were first subtracted from the reality.

Re Quimby. Quimby v. Quimby, 5 O. R. 738, followed. *Amsden et al. v. Kyle et al.* 439.

3. *Conditional gift—Condition becoming impossible—Vesting—Gift over—Time of payment.*]—A testator bequeathed his chattels and \$1,500 to be paid out of the proceeds. After providing for the investment of the estate, he proceeded: "the yearly interest accruing from the same to be paid over to my said wife yearly for the term of six years, or until my son shall become twenty-one. 5th. It is my will that the above-mentioned gifts and bequests to my wife shall be given to her in lieu of dower, and on the further condition that she will clothe, maintain, and suitably provide for my said son until he shall become twenty-one. 6th. It is further my will that on the coming of age of my said son my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies. 7th. In case my said son should die before coming of age, then the money so remaining as above, and to which he would then be entitled, shall be paid over to my two eldest brothers." The son died under twenty-one.

Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death, the gifts were denuded of the condition.

Held, also, that the testator's brothers were not entitled to payment of the capital until the time at which the son would have attained the age of twenty-one if he had lived; and in the meantime the widow was entitled to the income. *Graham v. Bolton*, 481.

4. *Construction—"Effects."*]—A testatrix by her will, after giving to her two sons a certain mortgage, and after sundry other specific bequests, continued: "I further direct that the balance of personal property, consisting of notes and other securities for money, be given to my two sons aforesaid * * also that if there be any effects possessed by me, at the time of my decease, that the same may be divided equally in value among my grandchildren, share and share alike."

The testatrix had no real estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and other funds in the purchase of land of which she died seised.

Held, affirming the decision of Proudfoot J., that the grandchildren were entitled to the said lands, as well as to the personal estate of which the testatrix died seised and possessed not specifically disposed of by the will. *Hammill et al. v. Hammill et al.*, 530.

5. *Charitable legacy—Uncertainty—Division among rival claimants—Gift to benevolent institutions in general of a specified place—Construction—Executors—Compensation fixed by will*—37 Vic. c. 9—R. S. O. c. 107, secs. 36-41.]—G. W. by his will bequeathed \$1,000 to "The Protestant Orphans' Home for Boys in Toronto." The evidence shewed that there were two institutions, either of which

might have been intended by the testator.

Held, that the legacy should be divided between them.

G. W. also bequeathed to "the Benevolent Institutions and Charities of Owen Sound, \$1,000, to be distributed as my executors shall deem meet."

Held, that the testator intended a bequest to the Municipal Corporation of Owen Sound, to be distributed as the executors should direct.

G. W. also by the said will directed his executors "to retain for their own use and benefit the sum of \$200 each, in lieu of all charges for their services in performing the duties imposed on them as executors of this my will."

Held, that under no circumstances could the executors who had accepted probate claim a larger sum than the amount specified as compensation for their services.

Denison v. Denison, 17 Gr. 306, doubted.

Seemle, that if an executor refused otherwise to act, and if it was found impracticable to deal with those entitled to the assets, the Court would have jurisdiction to permit the compensation given by the statute to be awarded to him on condition of his relinquishing what was given to him by the will. *Williams v. Roy et al.*, 534.

6. *Construction — Lapse of devise — Life estate — Estate tail — Barring entail.*]—In one clause of his will a testator devised certain lands to his son A.S.M. "as soon as he attains the age of 21 years for and during the term of his natural life," and after the determination of that estate to the sons of the body of A. S. M. in tail male, as they

should be in point of birth, and for want of such issue, then to the daughters of the body of A. S. M. and the heirs of the body of such daughters, which daughters and their issue were to take as tenants in common, and for default of such issue, the lands were to be divided amongst the testator's other sons, or the heirs of their respective bodies who at the death of A. S. M. should be entitled to any part of the lands devised in tail in the will to hold to his respective other sons, and in default of such sons and of their issue at the death of A. S. M. then to the right heirs of A. S. M. for ever.

A. S. M. predeceased the testator.

Held, that thereupon the devise to A. S. M. lapsed, the whole scope of the clause intending that A.S.M. should survive the testator.

In another clause of the will the testator devised certain other lands to his son W. M. "for and during and unto the end and term of his natural life," and after the determination of that estate to the sons of the body of W. M. in tail male, as they should be in point of birth, and for want of such issue to the daughters of the body of W. M. and the heirs of the body of such daughters, who were to take as tenants in common, and for want of such issue, the lands were to be divided amongst the testator's other sons, or the heirs of their respective bodies, who at the death of W. M. should be entitled to any part of the lands devised in tail in the will to hold to his said other sons respectively, or the heirs of their respective bodies in the same course of descent in tail as the other lands devised to them in tail respectively, and for default of such other sons and their issue at the death of W. M. to the right heirs of W. M. for ever.

Held, that W. M. took a life estate, with remainder in tail male, to his first and other sons successively, according to priority of birth, and failing male issue, with a further remainder to his daughters. And though circumstances might arise in which W. M. would have an estate in tail by way of remainder after the intermediate limitations to his first and succeeding sons, yet he could not so deal with that ultimate remainder as to divest their right to take as purchasers. *Riddell v. McIntosh et al.*, 606.

WITNESS.

See EVIDENCE.

WORDS, MEANING OF.

"*Per.*"—*See* CORPORATIONS, 1.

"*Creditors.*"—*See* FRAUDULENT CONVEYANCES, 3.

"*Grandchildren.*"—*See* WILL, 4.

"*Effects.*"—*See* WILL, 4.

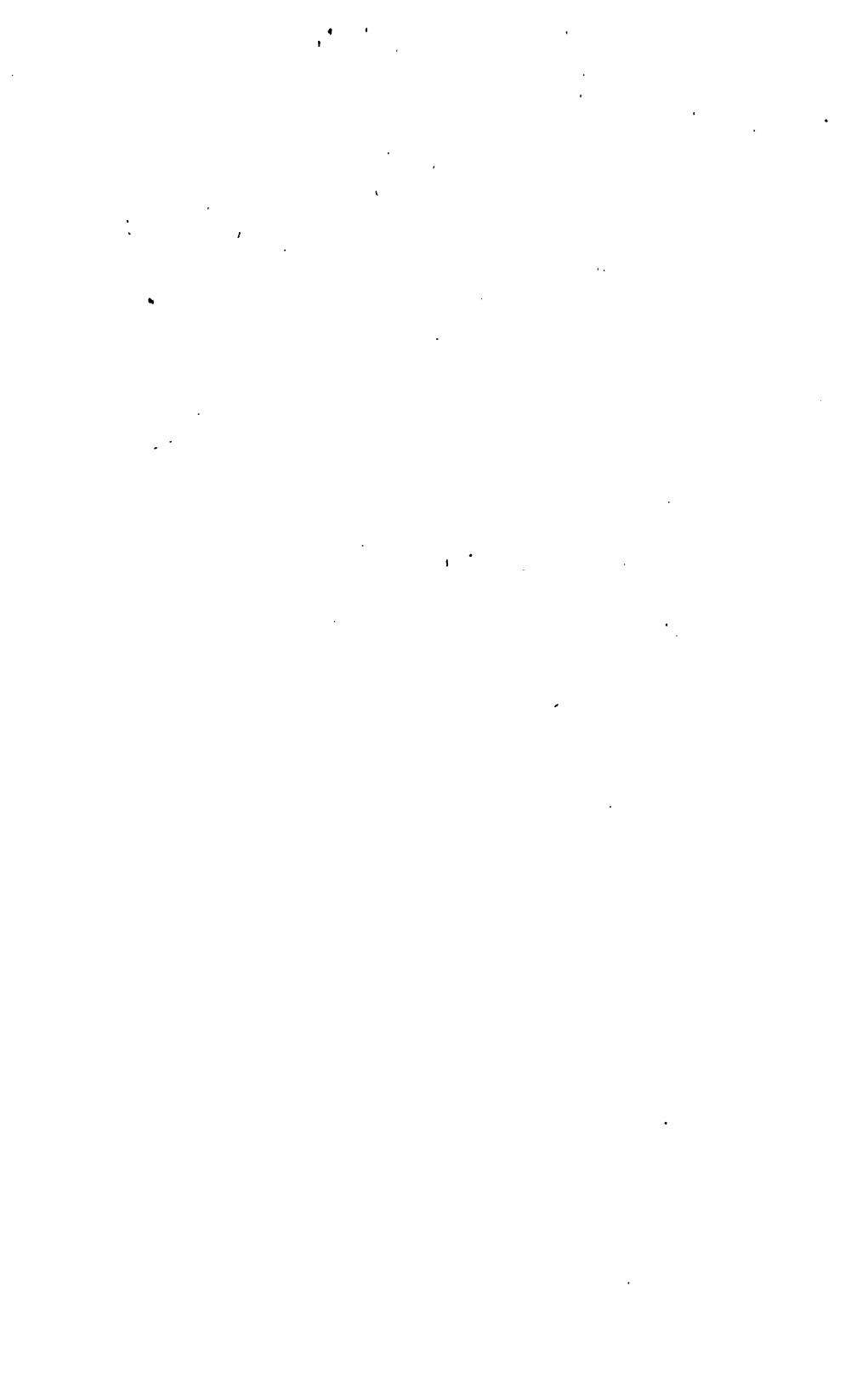
WORK AND LABOUR.

Building contract — Penalty or liquidated damages.—To an action for the balance due under a building contract, the defendant set up as a defence that by the contract the plaintiff was to build the house and have the same completely finished and ready for the defendant's occupation by a named date, "under a penalty of \$5 per day," to be paid by the plaintiff to the defendant, for each and every day the work on the said house remained unfinished after the said date; alleging that the work remained unfinished after the said date for a certain number of days, making an amount which the defendant claimed to deduct from the contract price.

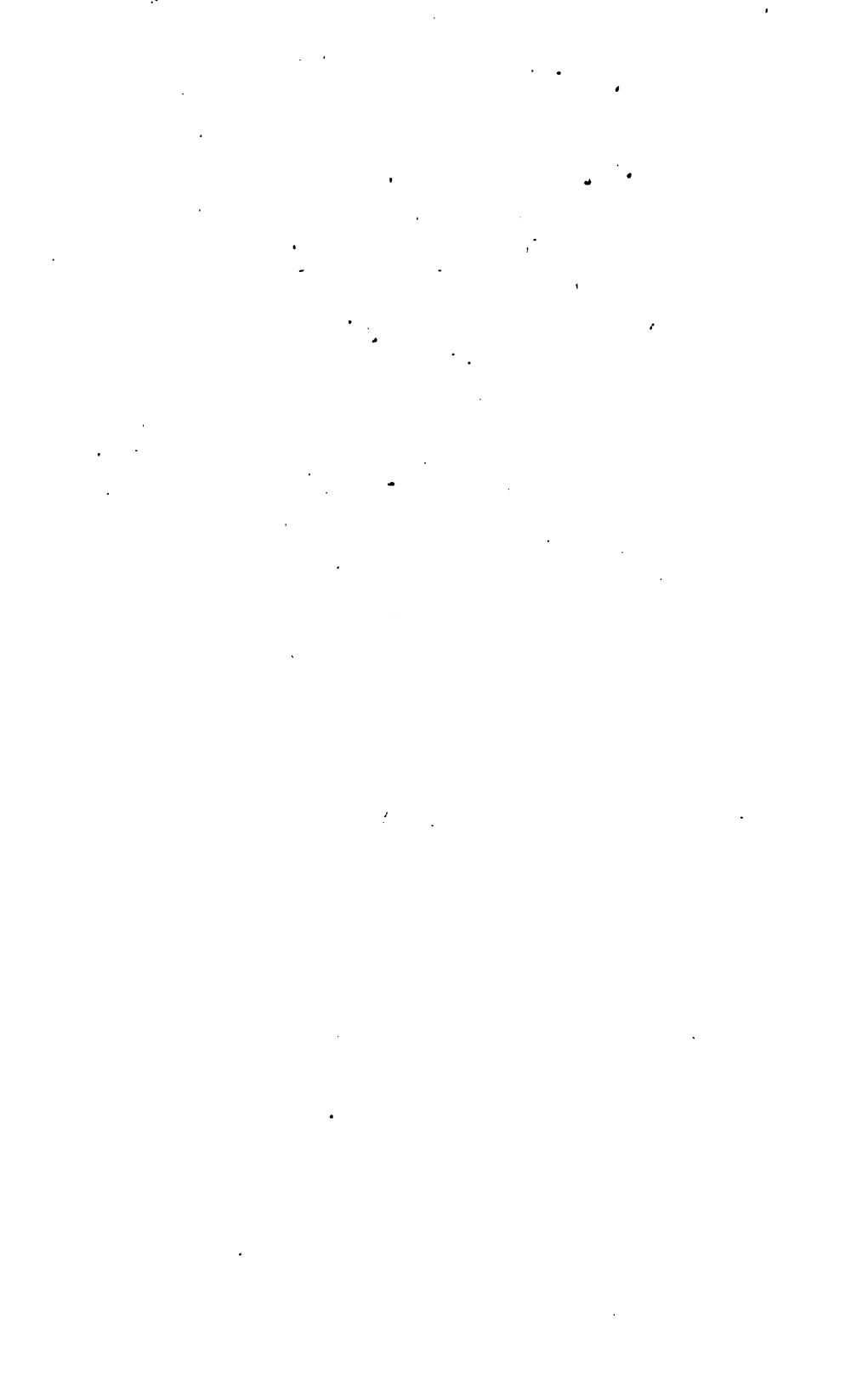
Held, on demurrer, defence good: that the \$5, though called a penalty, were in fact liquidated damages.

Quære, whether a demurrer was the proper mode of raising the question, as some damages would be recoverable. *Chatterton v. Crothers*, 683.









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